railway company, the cost of maintaining said property, the cost of moving freight traffic and also of moving passenger traffic, the cost of moving miscellaneous traffic such as mail and express, and,
310 generally, to inform himself minutely upon all the costs incurred and the expenditures made by said railway company; and also that as statistician he collects and classifies data with respect to the earnings and revenue of said company on all classes of traffic and from all sources.

Affiant further says that he has read the petition in the above-entitled cause and that the matters and things therein stated are correct.

Affiant further says that he has made for the Atchison, Topeka and Santa Fe Railway Company and its lines a practical test of the decision of the Interstate Commerce Commission of June 22, 1911, rendered upon the application of the carriers for relief under the fourth section, said decision being contained in opinion No. 1623 of the commission and being set out in full at pages 65 to 148, inclusive, of the petition in this cause, and that said test shows that said railway company would, by the operation of said decision, suffer an annual loss in freight revenue of not less than $250,000.

Affiant says that in reaching said conclusion he took the westbound freight traffic of said railway company for the months of October, 1909, and January, April, and July, 1910, those being the months designated by the Interstate Commerce Commission for the making of a test by it in case No. 1796, entitled Maricopa County Commercial Club vs. Santa Fe, Prescott and Phoenix Railway Company, which case also was decided along with the applications for relief under the fourth section in said opinion No. 1623; and upon applying to the westbound traffic from the zones specified in said opinion No. 1623 to Pacific coast terminals the rate relationship prescribed by the commission, the loss which would have been sustained by the railway company for the said four months had
311 said traffic moved at the rates contemplated in said opinion No. 1623 would have been upwards of $85,000 in comparison with the earnings from then existing rates, making three times that, or $250,000, for a period of one year.

Affiant further says that compliance with said opinion No. 1623 by said railway company would result in losses not included by him in said computation, because said opinion affects and would reduce rates into Nevada, a territory served by connections of the Atchison, Topeka and Santa Fe Railway Company, the traffic over which was not included in his said computation; and in this relation affiant further says that said railway company would suffer additional losses under opinion No. 1627 of the commission, appearing at page 149 et seq. of the petition in this cause and affecting rates to Utah, Nevada, Washington, and other intermountain territory served by northern lines of railway with which it forms connections and participates in freight traffic, which traffic was necessarily omitted from his said calculations.

Affiant further says that from his years of experience in the freight traffic business in the service of railway companies, and from his experience and knowledge as a statistician, he knows that the rates to interior points which would be made under a compliance with said opinions Nos. 1623 and 1627 would be unreasonably low, and would fall far short of yielding an adequate return for the service performed.

JAMES PEABODY.

Subscribed and sworn to before me this 11th day of October, 1911.

[NOTARIAL SEAL.] JOHN A. MCDONALD,
Notary Public.

My commission expires November 15, 1913.

312 *Petition of intervention.*

Filed October 17, 1911.

In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., petitioner.
vs.
UNITED STATES OF AMERICA, RESPONDENT.

PETITION OF INTERVENTION.

To the Honorable Judges of the United States Commerce Court:

Comes now the Chicago Association of Commerce and asks leave to intervene in the above entitled action, and in support thereof alleges and says:

That it is a corporation duly organized and existing under the laws of the State of Illinois, and has for its purpose the promotion and protection of the business of the city of Chicago.

That its membership is composed of practically all the wholesale and retail mercantile institutions, manufacturing institutions, and financial institutions of the city of Chicago, and that the number of the members of said association is approximately four thousand (4,000).

That it was one of the interveners in the proceeding under the various applications for relief under the fourth section, known as numbers 205, 342, 343, 344, 349, 350, and 352 on the docket of the Interstate Commerce Commission, the report in which is consolidated with the commission's report in cases number 1665, entitled "Rail-
313 road Commission of Nevada vs. Southern Pacific Company et al., and No. 1796, Maricopa Commercial Club xs. Santa Fe, Prescott & Phoenix Railway Company et al., which said report is attached to the original petition herein.

That it was an intervener in the proceeding before the Interstate Commerce Commission known as case No. 879, City of Spokane et al. vs. Northern Pacific Railway Company et al.

That fifty-seven per cent (57%) of all westbound Pacific coast terminal business originates at and west of Chicago, and that the members of said association are engaged in the sale of goods and merchandise that are shipped to Pacific coast terminals and intermediate points and under the rates involved in the said proceedings before the commission and involved in the original petition filed herein.

That in behalf of its members it is interested in the said complaints before the commission hereinbefore referred to and the orders of the commission made therein, which form the subject matter of petitioners' petition in this case; and that it is interested in the enforcement of said orders for the protection of its members.

Wherefore, said Chicago Association of Commerce prays that it be made a party to the above entitled suit and be allowed to file answer or other pleading as provided by law, and to be entitled to notice of all proceedings pertaining thereto in the same manner and to the same extent as though named as a party to such suit at the time the petition was filed in this case; said notices aforesaid to
314 the Chicago Association of Commerce, Great Northern Building, Chicago, Illinois, or to its attorneys, Cassoday, Butler, Lamb & Foster, room 1414, Monadnock Block, Chicago, Illinois.

CHICAGO ASSOCIATION OF COMMERCE,
By H. C. BARLOW,
Traffic Director.

CASSODAY, BUTLER, LAMB & FOSTER,
Attorneys for Intervener.

RUSH C. BUTLER,
WILLIAM E. LAMB,
STEPHEN A. FOSTER,
CORNELIUS LYNDE,
Of Counsel.

315 STATE OF ILLINOIS,
County of Cook:

WILLIAM E. LAMB, being first duly sworn, on oath deposes and says that he is one of the attorneys for the intervener above named; that he knows the facts stated in said petition of intervention, and that the same are true.

WILLIAM E. LAMB.

Subscribed in my presence and sworn to before me by said William E. Lamb, this 14th day of October, A. D. 1911.

D. V. RUBIDGE,
Notary Public.

316 *Order permitting City of Spokane et al. to intervene.*

(Entered October 18, 1911.)

No. 50.

In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. et al., petitioners, *vs.* UNITED STATES OF AMERICA, RESPONDENT. } Order of intervention.

The petition and application of the City of Spokane, Washington; County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and the Spokane Jobbers' Association of Spokane, Washington, coming on to be heard and determined by this court, and it appearing to the satisfaction of this court that the matters and things alleged and set forth in the intervention petition of said parties are sufficient to entitle the said petitioners to intervene and appear herein and become parties to this action as of right, and to be represented by their counsel:

Wherefore, it is hereby ordered that the City of Spokane, Washington; County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and the Spokane Jobbers' Association of Spokane, Washington, be and are, and each of them is, hereby permitted to appear as parties herein and hereto, and to intervene in this action as of right and be represented by their counsel, and to take such action and such part in this proceeding and action as they may determine, subject to the provisions of the law in such cases made and provided and the rules and practice of this court, and equity procedure and practice in general.

Done in open court this 18th day of October, A. D. 1911.

MARTIN A. KNAPP,
Presiding Judge.

317 *Answer of City of Spokane et al., interveners.*

(Filed October 18, 1911.)

In the United States Commerce Court.

October term, 1911.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., PETITIONERS, *vs.* UNITED STATES OF AMERICA, RESPONDENT. } No. 50.

Answer of interveners.

Come now interveners, City of Spokane, Washington; County of Spokane, Washington; Chamber of Commerce of Spokane, Wash-

ington; Spokane Jobbers' Association of Spokane, Washington, and for answer to the petition of the original petitioners herein:

I.

Admit the allegations contained in paragraph No. 1 of said petition.

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II.

Admit the allegations contained in paragraph No. 2 of said petition.

III.

Admit the allegations contained in paragraph No. 3 of said petition, except that the petitioners compete with other carriers, and deny that petitioners compete with each other or water carriers or any water carrier for Pacific coast business.

IV.

Admit that freight moves to a limited extent over the lines of the petitioners or some of them under the classes mentioned in paragraph 4 of the petition herein, and that the class rates to the Pacific coast terminals are as set forth in paragraph No. 4, and deny each and every other allegation, matter, and thing contained in paragraph No. 4 of said petition.

V.

Admit that freight can be and is transported by water from the Atlantic seaboard to the Pacific coast, and that freight can be and is transmitted by water from the Atlantic coast to the Isthmus

319 of Tehuantepec and Panama, and thence by rail to the Pacific coast, and thence by water to the Pacific coast terminals, and deny each and every other allegation, matter, and thing contained in paragraph No. 5 of the petition herein.

VI.

Admit that traffic moves to Pacific coast points from the Orient and other foreign nations, and deny each and every other allegation, matter, and thing contained in paragraph No. 6 of the petition herein.

VII.

Admit that the railways converge at the points mentioned in paragraph No. 7 of the petition herein, and deny each and every other allegation, matter, and thing contained in paragraph No. 7 of the petition herein.

VIII.

Admit that blanket rates exist from Missouri River points and east thereof to Pacific coast terminals, and deny each and every other allegation, matter, and thing contained in paragraph No. 8 of the petition herein.

IX.

Admit that much lower rates exist from Missouri River
320 points and all points east thereof to Pacific coast terminals than exist to such points as Spokane, Washington; Reno, Nevada; and Phœnix, Arizona, and other like interior points, and that such difference is much greater than the per cents mentioned in paragraph No. 9 of the petition herein, and deny each and every other allegation, matter, and thing contained in paragraph No. 9 of the petition herein.

X.

Admit the allegations contained in paragraph No. 10 of said petition.

XI.

Admit the allegations contained in paragraph No. 11 of said petition.

XII.

Admit the allegations contained in paragraph No. 12 of said petition.

XIII.

Admit the commerce act as amended by Congress June 18, 1910, and that such amendment is as set forth in the act of commerce, and admit that the carriers filed an application for permission to
321 charge more for shipments for the longer distance over the same line in the same direction, the shorter haul being included within the longer haul, and thereby applied for relief to the Interstate Commerce Commission to charge more to Pacific coast terminals than to interior points, such as Spokane, Washington, and deny each and every other allegation, matter, and thing contained in paragraph No. 13 of the petition herein.

XIV.

Admit that the hearing upon the applications for relief under the amended fourth section came on for hearing March 20, 1911, and that authority of the commission was given, as set forth in paragraph No.

14 of the petition herein, which reports are found in Interstate Commerce Commission reports in the volumes and pages stated in said paragraph No. 14, and deny each and every other allegation, matter, and thing contained in paragraph No. 14 of the petition herein.

XV.

Deny each and every allegation, matter, and thing contained in paragraph No. 15 of the petition herein.

XVI.

Deny each and every allegation, matter, and thing contained in paragraph No. 16 of the petition herein.

322 XVII.

Deny each and every allegation, matter, and thing contained in paragraph No. 17 of the petition herein.

XVIII.

Admit that the rates charged to Pacific coast terminals are in excess of out-of-pocket expense incident to the handling of traffic moving under said rates, and deny each and every other allegation, matter, and thing contained in paragraph No. 18 of the petition herein.

XIX.

Deny each and every allegation, matter, and thing contained in paragraph No. 19 of the petition herein.

XX.

Deny each and every allegation, matter, and thing contained in paragraph No. 20 of the petition herein.

XXI.

Deny each and every allegation, matter, and thing contained in paragraph No. 21 of the petition herein.

323 XXII.

Admit that if not enjoined, rates will become effective Nov. 15, 1911, in accordance with the findings, conclusions, decisions, and reports of the Interstate Commerce Commission in the so-called intermountain cases referred to in the affirmative matter pleaded in this answer, and deny each and every other allegation, matter, and thing contained in paragraph No. 22 of the petition herein.

Further answering the petition of the petitioners herein, the interveners, City of Spokane, Washington; County of Spokane, Wash-

ington; Chamber of Commerce of Spokane, Washington; and the Spokane Jobbers' Association of Washington, allege—

I.

That the Interstate Commerce Commission has made and filed its findings of fact in what are known as the "intermountain" cases, to wit, Spokane case No. 879, Nevada case No. 1665, the Arizona case No. 1796, and the Salt Lake case No. 2662. That in said cases findings of facts, conclusions, decisions, and reports have been made by the Interstate Commerce Commission after a full, fair, and complete hearing, and the findings, decisions, conclusions, and reports
324 made in the said cases are, as your interveners verily believe, more favorable to the petitioners herein than they are, or either of them is, entitled to.

II.

That said findings, conclusions, decisions, and reports are binding and conclusive upon the carriers, and for the purpose of this case and action the facts are as found by the Interstate Commerce Commission in the cases mentioned.

III.

That reference is hereby made to the findings, decisions, conclusions, and reports in said cases, and each of them, and unless this court takes judicial knowledge or notice thereof your interveners desire to have the same considered and become a part and parcel of this their answer herein.

IV.

Your interveners allege that the said findings, decisions, conclusions, and reports of the Interstate Commerce Commission show conclusively that the petitioners herein are not, nor is either or any of them, entitled to any relief herein.

Wherefore, interveners, City of Spokane, Washington; County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and the Spokane Jobbers' Association of Spokane,
325 Washington, pray that the petition herein be dismissed, and that the original petitioners herein go hence without day, without relief, and that said interveners shall recover of and from said original petitioners their costs and disbursements herein.

A. M. CRAVEN,
Corporation Counsel of the City of Spokane.
JOHN WILEY,
Prosecuting Attorney of the County of Spokane.
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors and Attorneys for Interveners: City of Spokane, Washington; County of Spokane, Washington; Chamber of Commerce, Washington; Spokane Jobbers' Ass'n, Washington.

326 UNITED STATES OF AMERICA,
City of Washington, District of Columbia, ss:

H. M. STEPHENS, being first duly sworn, upon oath deposes and says that he is one of the attorneys for the above-named interveners herein and makes this verification for and on their behalf; that he has read the foregoing answer and knows the contents thereof; that the same is true as he verily believes; that affiant has been one of the attorneys for said interveners for more than five years last past before the Interstate Commerce Commission in the action and proceeding No. 879 and has knowledge of the matters and things alleged and set forth in the answer herein.

H. M. STEPHENS.

Subscribed and sworn to before me this 18th day of October, A. D. 1911.

[NOTARIAL SEAL.] ARTHUR J. WARD,
Notary Public, Residing in the City of Washington, District of Columbia, United States of America.

327 *Affidavit of H. M. Stephens.*

(Filed October 18, 1911.)

In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL., petitioners,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } No. 50.

UNION PACIFIC RAILWAY COMPANY ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } No. 51.

UNITED STATES OF AMERICA,
City of Washington, District of Columbia, ss:

328 H. M. Stephens, being first duly sworn, on oath deposes and says that he has read the petition of the original petitioners herein on behalf of the original petitioners herein, and has also read the affidavits in support of an application for an injunction herein; that affiant has been one of the attorneys for interveners, City of Spokane, Washington; County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and the Spokane Jobbers' Association, of Spokane, Washington, for five years last past and has been at all the hearings by and before the Interstate Commerce Commission in action or proceeding No. 879, wherein the

above-named City of Spokane, Washington; County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and the Spokane Jobbers' Association, of Spokane, Washington, were and are complainants and the Northern Pacific Railway Company et al. were and are defendants; that from his relation as such attorney he is advised and knows of the facts concerning the matters involved in this proceeding and makes this affidavit for and on behalf of the interveners, City of Spokane, Washington; County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and Spokane Jobbers' Association, of Spokane, Washington; that in the opinion of affiant the facts found and the decisions, conclusions, opinions, and reports made by the Interstate Commerce Commission in said case No. 879 and other cognate cases—known as the Salt Lake, Nevada, and Arizona cases—are more favorable to the defend-
329 ants in said actions (the original petitioners herein) than they should expect, and in the opinion of affiant are more favorable than the facts and record in said cases justify; that as affiant understands the law and verily believes the facts found, opinions, conclusions, decisions, and reports made by the Interstate Commerce Commission are binding upon each and all the original petitioners herein and conclusive in all respects as to and so far as the facts involved in this action or proceeding are concerned; that the affidavits made herein for and on behalf of the original petitioners herein in support of the application for an injunction in this action, in so far and to the extent that they purport to state any matter or thing different from or beyond the findings of facts, opinions, conclusions, decisions, or reports of or by the Interstate Commerce Commission, are not warranted nor founded in fact; that all matters and things stated, covered, or referred to in the petition of the original petitioners herein, or the affidavits or any affidavit supporting an application for an injunction herein, are mattters and things which were under discussion and involved, considered, and determined in the actions and proceedings before the Interstate Commerce Commission, and were and are matters and things considered, determined, and adjudicated by the Interstate Commerce Commission after full, fair, complete, and thorough hearing and due and deliberate consideration in said actions, wherein formal complaints were
330 made and issues raised by the answers of the original petitioners herein.

H. M. STEPHENS.

Subscribed and sworn to before me this day of October, A. D. 1911.

[NOTARIAL SEAL.] ARTHUR J. WARD,
Notary Public, Residing in the City of Washington, District of Columbia, United States of America.

331 *Petition of Intervention.*

(Filed October 19, 1911.)

No. 50.

In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY Company et al., petitioners, v. UNITED STATES OF AMERICA, RESPONDENT. } Petition in intervention.

Come now the Interior Counties Freight Bureau of Southern California and Maricopa County Commercial Club, of Phoenix, Arizona, and respectfully petition and show to this honorable court as follows:

I.

That the Interior Counties Freight Bureau of Southern California is an association of persons, citizens of the United States, engaged in various lines of business in that part of southern California embracing the cities of Pomona, in the county of Los Angeles; San Bernardino, Redlands, and Colton, in the county of San Bernardino; Riverside and Corona, in the county of Riverside; and the cities of Imperial and El Cendro, in the county of Imperial, in the State of California, the members of which association are shippers of freight by rail over the railroad lines of petitioners, the Southern Pacific Railroad, the Atchison, Topeka & Santa Fe Railway, and the San Pedro, Los Angeles & Salt Lake Railroad, which lines of rail-
332 road converge in the valley of San Bernardino, California, and thence continue west parallel to each other to the city of Los Angeles, with one branch or line of the Atchison, Topeka & Santa Fe extending from San Bernardino to San Diego, in California; and the said Maricopa County Commercial Club of Phoenix is an association of citizens of the Territory of Arizona doing business in the cities of Phoenix and Tempe, in the county of Maricopa, the members of which club are shippers of freight by rail over the lines of petitioners, the Atchison, Topeka & Santa Fe Railway Company and of the Southern Pacific Company, both of which have lines of their respective roads entering the said city of Phoenix.

II.

That your petitioners herein appeared before the Interstate Commerce Commission upon the hearing of the application made on behalf of the petitioners in this cause by R. H. Countis, agent, in the proceeding instituted before said commission designated upon the docket of same as fourth section dockets Nos. 205, 342, 343, 344,

345, 346, 347, 348, 349, 350, 351, 352, and 1575; and at said hearing thereon had in the month of March, 1911, before the Interstate Commerce Commission these petitioners offered evidence before such commission in opposition to the granting of relief upon such applications, and these petitioners have an interest in this cause and to protect the same desire to appear as parties to and in this cause and be represented therein by their counsel.

Wherefore your petitioners pray that an order be made and
333 entered herein, granting and allowing them leave and right to intervene and appear as parties to this action, and to be represented by their counsel as and to the extent authorized by law and the rules of equity practice and procedure in this court.

And your petitioners will ever pray.

BYRON WATERS,
Attorney for Petitioners, Interior Counties Freight Bureau of Southern California, Maricopa County Commercial Club.

334 UNITED STATES OF AMERICA,
City of Washington, District of Columbia, ss:

BYRON WATERS, being first duly sworn upon his oath deposes and says that he is the attorney for the petitioners making and filing this petition herein, and makes this verification for and on behalf of said petitioners and each of them; that affiant personally knows the matters and things set forth and stated in said petition; that the matters and things stated and set forth in said proceeding are true as affiant verily believes.

BYRON WATERS.

Subscribed and sworn to before me this 19th day of October, 1911.

[NOTARIAL SEAL.] H. S. MILSTEAD,
Notary Public, residing at Washington, District of Columbia, United States of America.

335 *Affidavits of F. M. Dewees.*

(Filed October 19, 1911.)

In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY Company et al., petitioners,
vs.
THE UNITED STATES OF AMERICA, respondent.
} In Equity. No. 50.

AFFIDAVITS OF F. M. DEWEES.

STATE OF COLORADO,
City and County of Denver, ss:

F. M. DEWEES, being first duly sworn, deposes and says that he is the auditor of freight receipts of the Denver and Rio Grande Rail-

road Company, and has occupied that position since March 1, 1903, and that prior to that time for thirteen years he occupied various positions in the accounting department of the Denver and Rio Grande Railroad Company.

336 The Denver and Rio Grande Railroad Company has a mileage of 2,597 miles of track, of which the main east and west line, running from Denver, via Pueblo and via Provo and Salt Lake City, to Ogden, is 778 miles, while other main lines and branch lines together aggregate 1,819 miles.

The issued and outstanding capital stock of the company consists of $38,000,000 of common stock and $49,779,800 of preferred stock. The company has outstanding bonds secured by mortgage to the aggregate principal amount of $117,831,000.

From July, 1900, to January, 1911, the Denver and Rio Grande Railroad Company paid semiannual dividends on its outstanding preferred stock at the rate of 5 per cent per annum. But in June, 1911, its surplus was insufficient to pay the customary semiannual dividend of 2½ per cent, and also to meet certain other obligations of the company, hereinafter referred to, and for that reason the dividend was passed, and the company has paid no dividend since January, 1911, on the preferred stock, and has never at any time paid any dividend upon its common stock.

The following is a brief summary of the company's income account for the period commencing with July 1, 1908, and ending June 30, 1911:

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	For fiscal year ended June 30—		
	1909	1910	1911
Operating revenue	$20,876,571	$23,563,436	$23,391,771
Operating expenses	14,452,574	15,801,954	15,957,737
Net operating revenue	6,423,997	7,761,482	7,434,034
Outside operations	43,538	17,985	(Loss) 27,600
Total net revenue	6,467,535	7,779,467	7,406,434
Less taxes	762,823	823,515	859,621
Operating income	5,704,712	6,955,952	6,546,813
Add other income from securities owned, etc	1,379,417	1,537,871	1,849,406
	7,084,129	8,493,823	8,396,219
Deduct interest on funded debt, etc	4,027,181	5,485,656	5,913,176
Net income for the year	3,056,948	3,008,167	2,483,043
From which deduct—			
Dividend on preferred stock and $120,000 per annum renewal fund	2,408,990	2,608,990	1,364,495
	647,958	399,177	1,118,548
Less appropriations for betterments and equipment	361,244		
	286,714	399,177	1,118,548
Interest on Western Pacific first mortgage bonds			1,248,125
Surplus	286,714	399,177	
Deficit			129,577

By contracts made in the year 1905 the Denver and Rio Grande Railroad Company guaranteed the prompt payment of the interest

on $50,000,000 of first-mortgage bonds of the Western Pacific Railway Company, all of which bonds have been issued with the exception of $75,000. At that time the said Western Pacific Railway was not constructed, but the construction of the same was about to be entered upon. It has but recently been completed and affiant is informed that it is not in a condition to meet its own interest
338 payments, and the Denver and Rio Grande Railroad Company, under its guaranty, has been obliged to pay the same. The semiannual interest due on said first-mortgage bonds of the Western Pacific Railway Company on September 1, 1911, was $1,248,125. The surplus of the Denver and Rio Grande Railroad Company on June 30, 1911, as above set forth, was $1,118,548, without making any deduction on account of the second semiannual dividend. Said semiannual dividend, if paid at the rate theretofore customary with the company of 2½ per cent, would have amounted to $1,244,495, and being in excess of the then existing surplus, would have left no provision for the fulfillment of the company's obligations upon its guaranty of said interest on Western Pacific first-mortgage bonds, and by action of the company the money which would otherwise have been devoted to the payment of dividend was applied pro tanto in the payment of said interest obligation of the Western Pacific Company so maturing on September 1, 1911.

The order of the Interstate Commerce Commission upon the so-called Countiss application and known as fourth section order No. 124, will cause large losses in net income of the Denver and Rio Grande Railroad Company. The amount of such loss can not be exactly ascertained owing to the great number of rates involved, the shifting of distributing points under any disturbance of rate adjustment, the reflex influence of such adjustment upon rates at
339 points adjacent to intermediate points and other circumstances and conditions. But affiant says he has considered all elements entering into and determining the probable effect of said order upon the revenues of said company and has examined and reviewed the data in his possession as auditor of freight receipts of said company, and that from such consideration and examination and from the experience and knowledge of affiant acquired during his twenty-one years of service with said company relating to such matters, affiant says in his opinion the loss of revenue of said company will amount to not less than $160,000 per year; and if the order of the Interstate Commerce Commission in the Salt Lake case becomes effective, entailing a loss of revenue of over $156,000 to the Denver & Rio Grande Railroad Company (see affidavit of F. M. Dewees in Denver & Rio Grande Railroad Company vs. United States of America, No. 52), the total loss that the Denver & Rio Grande will have to suffer will be over $316,000. These losses, should the orders become effective, would come out of the net income and hence out of the surplus of the company, if there should be one, and there would be no corresponding diminution of expenses.

Had the rates ordered in by the commission in the said order No. 124 and also in the Salt Lake case been in effect for the last three fiscal years, it would have had the following effect upon the net surplus of the Denver & Rio Grande Railroad Company:

340 For the year ended June 30, 1909, the surplus would be reduced from $286,714 to a deficit of $29,286; for the year ended June 30, 1910, from a surplus of $399,177 to a surplus of $83,177; for the year ended June 30, 1911, the orders would have increased the deficit from $129,577 to $445,577.

There has been a great increase in recent years in the percentage of operating expenses to operating revenue. The percentage of operating expenses in 1906 was 61.49 per cent; in 1907, 62.32 per cent; in 1908, 63.96 per cent; and the average for the last three years has been 68.13 per cent.

As above stated, the reduction in revenue which would result from the enforcement of said fourth section order would be a reduction in net income, and to make up the amount of such loss in net income it would be necessary, if said order shall become effective, for the company's gross revenue to increase by the sum of $502,040, in order to maintain a net income equal to what has been derived on traffic between the same points under the rates now existing; and if both the fourth section orders and the Salt Lake case order become effective, it will be necessary for the company, in order to maintain a net income equal to what has been derived on traffic between the same points under the rates now existing, to increase the company's gross revenue $991,528.

The company's revenue for the first two months of the current fiscal year does not, however, suggest the possibility of any such increase, and on the contrary the general business of the

341 company for said two months shows a material decrease in gross and net revenue in the current fiscal year as compared with the preceding fiscal year, as will be demonstrated by the following table:

JULY AND AUGUST, 1911, COMPARED WITH JULY AND AUGUST, 1910.

Operating revenue.	Current year.	Previous year.	Increase.	Decrease.
Freight	$2,607,917	$2,946,642	.....	$338,725
Passenger	1,078,545	1,118,324	.....	39,779
Express, mails, etc	179,240	185,181	.....	5,941
Total operating revenue	4,105,702	4,253,147	.....	84,445
Operating expenses	2,878,240	2,703,810	$174,430	.....
Net operating revenue	1,287,462	1,546,337	.....	258,875
Add outside operations	12,872	8,105	4,767	.....
Total net revenue	1,300,334	1,554,442	.....	254,108
Less taxes	140,000	140,000	.....	.....
Operating income	1,160,334	1,414,442	.....	254,108
Net income, debit	853,179	826,239	26,850	.....
Net income	307,155	588,113	.....	280,958

Since January 1, 1910, operating condition have changed materially on the line of the Denver and Rio Grande Railroad Company, the tendency being towards a constant increase in wages and a constant decrease in rates. The following statement shows in detail increases of wages granted to various classes of labor and the effective date of the same, all of said increases having been compelled by conditions which the company could not resist, most of them resulting from mediation or arbitration.

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	Total rolls.	Increase per annum.	Per cent increase.	Date effective.
Skilled shop labor	$2,039,803	$256,846	12.59	Jan. 1, 1910, and Mch. 22, 1911.
Yardmasters and switchmen	422,700	34,788	8.23	May 1, 1910.
Hostlers	69,686	5,101	7.32	Oct. 6, 1910.
Firemen	700,085	40,675	5.81	Oct. 6, 1910.
Engineers	1,051,213	94,609	9.00	Mch. 22, 1911.
Trainmen	1,401,738	112,139	8.00	Apl. 1, 1911.
Telegraphers	300,000	9,000	3.00	Sept., 1911.
Total	5,985,225	553,158	9.24	

The constant decrease in tonnage revenue on the company's line is shown in the following rate per ton per mile statement:

For the fiscal year ended June 30, 1907	.0134
" " " " " June 30, 1908	.0133
" " " " " June 30, 1909	.0131
" " " " " June 30, 1910	.0128
" " " " " June 30, 1911	.0124

Percentage of reduction for four years, 7.46 per cent.

During the same period the burden of taxes imposed upon the company has greatly increased, as will appear from the following table:

Taxes for fiscal year ended June 30, 1907	$730,387.00
" " " " " June 30, 1908	750,470.00
" " " " " June 30, 1909	762,823.00
" " " " " June 30, 1910	823,515.00
" " " " " June 30, 1911	859,621.00

Increase of taxes in last four years, $129,234.00, or 17.69 per cent.
Increase in last two years, $96,798.00, or 12.69 per cent.

And further affiant saith not.

F. M. DEWEES.

Subscribed and sworn to before me this 14th day of October, A. D. 1911.

My commission expires January 2, 1912.

[SEAL.] JOHN W. E. RIDGWAY,
Notary Public.

343 UNITED STATES OF AMERICA, *ss:*

In the United States Commerce Court.

THE ATCHISON, TOPEKA AND SANTA FE RY. CO. ET AL.,
petitioners,
vs. No. 50.
THE UNITED STATES OF AMERICA, RESPONDENT.

AFFIDAVIT OF F. M. DEWEES.

STATE OF COLORADO,
City and County of Denver, ss:

F. M. DEWEES, being first duly sworn, deposes and says that as auditor of freight receipts of the Denver and Rio Grande Railroad Company he made a compilation of rates shown in current tariffs covering various commodities affected by the ruling of the Interstate Commerce Commission on the so-called Countiss application, which said ruling is designated order No. 124; that attached hereto is a tabulated statement showing the effect of said order upon
344 rates contained in the current tariffs on file with the Interstate Commerce Commission, and that said tabulation is correct.

And further affiant saith not.

F. M. DEWEES.

Subscribed and sworn to before me this 14th day of October, A. D. 1911.

My commission expires January 2, 1912.

[SEAL.] JOHN W. E. RIDGWAY,
Notary Public.

345 TABULATED STATEMENT.

346 CURRENT FREIGHT RATES COMPARED WITH MAXIMUM RATES UNDER THE I. C. C. ORDERS IN THE SALT LAKE AND FOURTH SECTION CASES.

	In cents per 100 lbs.							
	From zone 1.		From zone 2.		From zone 3.		From zone 4.	
	From zone 1.		From zone 2.		From zone 3.		From zone 4.	
Arc light globes.								
To Pacific coast terminals	120	300	120	300	120	300	120	300
To Salt Lake (present rates)	205	205	285	285	298	312½	321	344
" " (Salt Lake order)	190	190	245	245	269	283½	292	315
" " (4th section order)	120	300	128	321	138	345	150	375
To Grand Jct. (present rates)	265	265	320	320	344	358½	367	390
" " (4th section order)	120	300	128	321	138	345	150	375
To Canon City (present rates)	165	165	220	220	244	258½	267	295
" " (4th section order)	120	300	128	321	138	345	150	370
To Colo. com. points (present rates)	125	125	180	180	204	218½	227	250
" " " " (4th sec. order)	120	300	128	321	138	345	150	375

TABULATED STATEMENT—Continued.

CURRENT FREIGHT RATES COMPARED WITH MAXIMUM RATES UNDER THE I. C. C. ORDERS IN THE SALT LAKE AND FOURTH SECTION CASES—Contd.

	In cents per 100 lbs.							
	From zone 1.		From zone 2.		From zone 3.		From zone 4.	
	From zone 1.		From zone 2.		From zone 3.		From zone 4.	
	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.
Asbestos.								
To Pacific coast terminals	100	150	100	150	100	150	100	150
347 To Salt Lake (present rates)	106	153	133	198	147½	213	160	230
" " (Salt Lake order)	80	142	100	172	118	193	130	210
" " (4th section order)	100	150	107	160½	115	172½	125	187½
To Grand Jct. (present rates)	110	190	127	220	144½	241	157	258
" " (4th section order)	100	150	107	160½	115	172½	125	187½
To Canon City (present rates)	71	109	88	139	105½	160	118	177
" " (4th section order)	100	150	107	160½	115	172½	125	187½
To Colo. com. points (present rates)	50	80	67	110	84½	131	97	148
" " " " (4th sec. order)	100	150	107	160½	115	172½	125	187½
Axle grease.								
To Pacific coast terminals	90	150	90	150	90	150	90	150
To Salt Lake (present rates)	106	128	133	160	147½	181	160	198
" " (Salt Lake order)	72	119	90	139	108	163	120	179
" " (4th section order)	90	150	96	160½	103½	172½	112½	187½
To Grand Jct. (present rates)	110	140	127	160	144½	184	157	201
" " (4th section order)	90	150	96	160½	103½	172½	112½	187½
To Canon City (present rates)	71	89	88	109	105½	133	118	150
" " (4th section order)	90	150	96	160½	103½	172½	112½	187½
To Colo. com. points (present rates)	50	65	67	85	84½	109	97	126
" " " " (4th sec. order)	90	150	96	160½	103½	172½	112½	187½

	In cents per 100 lbs.							
	From zone 1.		From zone 2.		From zone 3.		From zone 4.	
	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.
348 *Babbitt metal.*								
To Pacific coast terminals	100	150	100	150	100	150	100	150
To Salt Lake (present rates)	106	153	133	198	147½	220½	160	242
" " (Salt Lake order)	80	142	100	172	118	200½	130	222
" " (4th section order)	100	150	107	160½	115	172½	125	187½
To Grand Jct. (present rates)	110	190	127	220	144½	248½	157	270
" " (4th section order)	100	150	107	160½	115	172½	125	187½
To Canon City (present rates)	71	109	88	139	105½	167½	118	189
" " (4th section order)	100	150	107	160½	115	172½	125	187½
To Colo. com. points (present rates)	50	80	67	110	84½	138½	97	160
" " " " (4th sec. order)	100	150	107	160½	115	172½	125	187½
Bags and bagging.								
To Pacific coast terminals	85	125	85	125	85	125	85	125
To Salt Lake (present rates)	100	153	120	198	141	220½	144	242
" " (Salt Lake order)	68	142	85	172	106	200½	110	222
" " (4th section order)	85	125	91	134	98	144	106	156
349 To Grand Jct. (present rates)	95	190	116	220	137	248½	140	270
" " (4th section order)	85	125	91	134	98	144	106	156
To Canon City (present rates)	50	109	80	139	101	167½	104	189
" " (4th section order)	85	125	91	134	98	144	106	156
To Colo. com. points (present rates)	35	80	56	110	77	138½	80	160
" " " " (4th sec. order)	85	125	91	134	98	144	106	156
Baking powder.								
To Pacific coast terminals	120	170	120	170	120	170	120	170
To Salt Lake (present rates)	128	153	160	198	177	220½	192	242
" " (Salt Lake order)	96	142	120	172	141	200½	155	222
" " (4th section order)	120	170	128	182	138	195	150	212½
To Grand Jct. (present rates)	140	190	160	220	180	248½	195	270
" " (4th section order)	120	170	128	182	138	195	150	212½
To Canon City (present rates)	89	109	109	139	129	167½	144	189
" " (4th section order)	120	170	128	182	138	195	150	212½
To Colo. com. points (present rates)	65	80	85	110	105	138½	120	160
" " " " (4th sec. order)	120	170	128	182	138	195	150	212½

TABULATED STATEMENT—Continued.

CURRENT FREIGHT RATES COMPARED WITH MAXIMUM RATES UNDER THE I. C. C. ORDERS IN THE SALT LAKE AND FOURTH SECTION CASES—Contd.

	In cents per 100 lbs.							
	From zone 1.		From zone 2.		From zone 3.		From zone 4.	
	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.
350 *Belting.*								
To Pacific coast terminals	120	175	120	175	120	175	120	175
To Salt Lake (present rates)	153	205	198	285	220½	305	242	332
" " (Salt Lake order)	96	190	120	245	150	276	170	303
" " (4th section order)	120	175	128	187	138	201	150	219
To Grand Jct. (present rates)	190	265	220	320	248½	351	270	378
" " (4th section order)	120	175	128	187	138	201	150	219
To Canon City (present rates)	109	165	139	220	167½	251	189	278
" " (4th section order)	120	175	128	187	138	201	150	219
To Colo. com. points (present rates)	80	125	110	180	138½	211	140	238
" " " " (4th sec. order)	120	175	128	187	138	201	150	219
Boiler compound.								
To Pacific coast terminals	75	125	75	125	75	125	75	125
To Salt Lake (present rates)	106	153	138	198	156½	220½	171½	242
" " (Salt Lake order)	98	142	115	172	136	200½	150	222
" " (4th section order)	75	125	80	134	86	144	94	156
351 To Grand Jct. (present rates)	120	190	140½	220	160	248½	175	270
" " (4th section order)	75	125	80	134	86	144	94	156
To Canon City (present rates)	78	109	98½	139	118	167½	133	189
" " (4th section order)	75	125	80	134	86	144	94	156
To Colo. com. points (present rates)	60	80	80½	110	100	138½	115	160
" " " " (4th sec. order)	75	125	80	134	86	144	94	156
Boots and shoes—Rubber.								
To Pacific coast terminals	150	200	150	200	150	200	150	200
To Salt Lake (present rates)	205	205	285	285	305	312½	332	344
" " (Salt Lake order)	140	190	175	245	214	283½	240	315
" " (4th section order)	150	200	160½	214	172½	230	187½	250
To Grand Jct. (present rates)	265	265	320	320	351	358½	378	390
" " (4th section order)	150	200	160½	214	172½	230	187½	250
To Canon City (present rates)	165	165	220	220	251	258½	278	290
" " (4th section order)	150	200	160½	214	172½	230	187½	250
To Colo. com. points (present rates)	125	125	180	180	211	218½	238	250
" " " " (4th sec. order)	150	200	160½	214	172½	230	187½	250
352 *Books.*								
To Pacific coast terminals	140	200	140	200	140	200	140	200
To Salt Lake (present rates)	205	205	285	285	293½	312½	315	344
" " (Salt Lake order)	112	190	140	245	170	283½	190	315
" " (4th section order)	140	200	150	214	161	230	175	250
To Grand Jct. (present rates)	265	265	320	320	339½	358½	361	390
" " (4th section order)	140	200	150	214	161	230	175	250
To Canon City (present rates)	165	165	220	220	239½	258½	261	290
" " (4th section order)	140	200	150	214	161	230	175	250
To Colo. com. points (present rates)	125	125	180	180	199½	218½	221	250
" " " " (4th sec. order)	140	200	150	214	161	230	175	250
Brass ingots.								
To Pacific coast terminals	125	185	125	185	125	185	125	185
To Salt Lake (present rates)	128	153	160	198	173½	220½	186	242
" " (Salt Lake order)	119	142	139	172	156½	200½	169	222
" " (4th section order)	125	185	134	198	144	213	156	231
353 To Grand Jct. (present rates)	140	190	160	220	176½	248½	189	270
" " (4th section order)	125	185	134	198	144	213	156	231
To Canon City (present rates)	89	109	109	139	125½	167½	138	189
" " (4th section order)	125	185	134	198	144	213	156	231
To Colo. com. points (present rates)	65	80	85	110	101½	138½	114	160
" " " " (4th sec. order)	125	185	134	198	144	213	156	231
Butcher blocks.								
To Pacific coast terminals	85	135	85	135	85	135	85	135
To Salt Lake (present rates)	83	128	110	160	125	181	137½	198
" " (Salt Lake order)	77	119	95	139	110½	163	123	179
" " (4th section order)	85	135	91	144	98	155	106	169

TABULATED STATEMENT—Continued.

CURRENT FREIGHT RATES COMPARED WITH MAXIMUM RATES UNDER THE I. C. C. ORDERS IN THE SALÆ LAKE AND FOURTH SECTION CASES—Contd.

	In cents per 100 lbs.							
	From zone 1.		From zone 2.		From zone 3.		From zone 4.	
	C. L.	L. C. L.	C. L	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.
Butcher Blocks—Continued.								
To Grand Jct. (present rates)	93	140	111	160	126½	184	139	201
" " (4th section order)	85	135	91	144	98	155	106	169
To Canon City (present rates)	58	80	76	109	91½	133	104	150
" " (4th section order)	85	135	91	144	98	155	106	169
To Colo. com. points (present rates)	45	65	63	85	78½	109	91	125
" " " " (4th sec. order)	85	135	91	144	98	155	106	169
354 *Carpets and rugs.*								
To Pacific coast terminals	185	260	185	260	185	260	185	260
To Salt Lake (present rates)	205	205	285	285	312½	312½	344	344
" " (Salt Lake order)	148	190	185	245	230	283½	260	315
" " (4th section order)	185	260	198	278	213	299	231	325
To Grand Jct. (present rates)	265	265	320	320	358½	358½	390	390
" " (4th section order)	185	260	198	278	213	299	231	325
To Canon City (present rates)	165	165	220	220	258½	258½	290	290
" " (4th section order)	185	260	198	278	213	299	231	325
To Colo. com. points (present rates)	125	125	180	180	218½	218½	250	250
" " " " (4th sec. order)	185	260	198	278	213	299	231	325
Carpet lining—Felt (in rolls).								
To Pacific coast terminals	110	185	110	185	110	185	110	185
To Salt Lake (present rates)	97½	153	112½	198	130	213	142½	230
" " (Salt Lake order)	88	142	110	172	128	193	140	210
" " (4th section order)	110	185	118	198	126½	213	137½	231
355 To Grand Jct. (present rates)	104	190	120	220	137½	241	150	258
" " (4th section order)	110	185	118	198	126½	213	137½	231
To Canon City (present rates)	65	109	81	139	98½	160	111	177
" " (4th section order)	110	185	118	198	126½	213	137½	231
To Colo. com. points (present rates)	44	80	60	110	77½	131	90	146
" " " " (4th sec. order)	110	185	118	198	126½	213	137½	231
Clothing—Oil skin.								
To Pacific Coast terminals	160	220	160	220	160	220	160	220
To Salt Lake (present rates)	205	205	285	285	312½	312½	344	344
" " (Salt Lake order)	190	190	245	245	283½	283½	315	315
" " (4th section order)	160	220	171	235	184	253	200	275
To Grand Jct. (present rates)	265	265	320	320	358½	358½	390	390
" " (4th section order)	160	220	171	235	184	253	200	275
To Canon City (present rates)	165	165	220	220	258½	258½	290	290
" " (4th section order)	160	220	171	235	184	253	200	275
To Colo. com. points (present rates)	125	125	180	180	218½	218½	250	250
" " " " (4th sec. order)	160	220	171	235	184	253	200	275
Clothes wringers.								
To Pacific coast terminals	125	175	125	175	125	175	125	175
356 To Salt Lake (present rates)	128	175	160	240	177	262	192	288
" " (Salt Lake order)	100	162	125	207	146	238	160	264
" " (4th section order)	125	175	134	187	144	201	156	219
To Grand Jct. (present rates)	140	225	160	270	180	301	195	328
" " (4th section order)	125	175	134	187	144	201	156	219
To Canon City (present rates)	89	135	109	180	129	211	144	238
" " (4th section order)	125	175	134	187	144	201	156	219
To Colo. com. points (present rates)	65	100	85	145	105	176	120	203
" " " " (4th sec. order)	125	175	134	187	144	201	156	219
Cocoa and chocolate.								
To Pacific coast terminals	125	175	125	175	125	175	125	175
To Salt Lake (present rates)	175	175	220	240	247½	262	269	288
" " (Salt Lake order)	100	162	125	207	155	238	175	265
" " (4th section order)	125	175	134	187	144	201	156	219
To Grand Jct. (present rates)	205	225	250	270	277½	301	299	328
" " (4th section order)	125	175	134	187	144	201	156	219
357 To Canon City (present rates)	115	135	160	180	187½	211	209	238
" " (4th section order)	125	175	134	187	144	201	156	219
To Colo. com. points (present rates)	80	100	125	145	152½	176	174	203
" " " " (4th sec. order)	125	175	134	178	144	201	156	219

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TABULATED STATEMENT—Continued.

CURRENT FREIGHT RATES COMPARED WITH MAXIMUM RATES UNDER THE I. C. C. ORDERS IN THE SALE LAKE AND FOURTH SECTION CASES—Contd.

	In cents per 100 lbs.							
	From zone 1.		From zone 2.		From zone 3.		From zone 4.	
	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.
Cocoanuts.								
To Pacific coast terminals	125	150	125	150	125	150	125	150
To Salt Lake (present rates)	175	175	240	240	235½	250½	248	272
" " (Salt Lake order)	162	162	207	207	211½	226½	224	248
" " (4th section order)	125	150	134	160½	144	172½	156	187½
To Grand Jct. (present rates)	225	225	270	270	274½	289½	287	311
" " (4th section order)	125	150	134	160½	144	172½	156	187½
To Canon City (present rates)	135	135	180	180	184½	199½	197	221
" " (4th section order)	125	150	134	160½	144	172½	156	187½
To Colo. com. points (present rates)	100	100	145	145	149½	164½	162	186
" " " " (4th section order)	125	150	134	160½	144	172½	156	187½
Copperas.								
To Pacific coast terminals	50	125	50	125	50	125	50	125
To Salt Lake (present rates)	50½	128	69	160	79½	177	88	192
" " (Salt Lake order)	50	119	62	139	72½	160	81	174
" " (4th section order)	50	125	53½	134	57½	144	62½	156
358 To Grand Jct. (present rates)	65	140	77	160	87½	180	96	195
" " (4th section order)	50	125	53½	134	57½	144	62½	156
To Canon City (present rates)	44	89	56	109	66½	129	75	144
" " (4th section order)	50	125	53½	134	57½	144	62½	156
To Colo. com. points (present rates)	35	65	47	85	57½	105	66	120
" " " " (4th sec. order)	50	125	53½	134	57½	144	62½	156
Copper—Bar and ingot.								
To Pacific coast terminals	125	175	125	175	125	175	125	175
To Salt Lake (present rates)	128	153	160	198	146	220½	146½	242
" " (Salt Lake order)	119	142	139	172	156½	200½	157	222
" " (4th section order)	125	175	134	187	144	201	156	219
To Grand Jct. (present rates)	95	190	107½	220	125	248½	125½	270
" " (4th section order)	125	175	134	187	144	201	156	219
To Canon City (present rates)	44	109	56½	139	74	167½	74½	189
" " (4th section order)	125	175	134	187	144	201	156	219
359 To Colo. com. points (present rates)	20	80	32½	110	50	138½	50½	160
To Colo. com. points (4th sec. order)	125	175	134	187	144	201	156	219
Cotton piece goods.								
To Pacific coast terminals	110	160	110	160	110	160	110	160
To Salt Lake (present rates)	200	200	250	250	277	277	300	300
" " (Salt Lake order)	125	125	156	156	189	189	211	211
" " (4th section order)	110	160	118	171	126½	184	137½	200
To Grand Jct. (present rates)	205	205	255	255	282	282	305	305
" " (4th section order)	110	160	118	171	126½	184	137½	200
To Canon City (present rates)	120	120	170	170	197	197	220	220
" " (4th section order)	110	160	118	171	126½	184	137½	200
To Colo. com. points (present rates)	80	80	130	130	157	157	180	180
" " " " (4th sec. order)	110	160	118	171	126½	184	137½	200
Cream of tartar.								
To Pacific coast terminals	120	170	120	170	120	170	120	170
To Salt Lake (present rates)	175	175	240	240	239	250½	254	272
" " (Salt Lake order)	162	162	207	207	215	226½	230	248
" " (4th section order)	120	170	128	182	138	195½	150	212½
380 To Grand Jct. (present rates)	225	225	270	270	278	289½	293	311
To Grand Jct. (4th section order)	120	170	128	182	138	195½	150	212½
To Canon City (present rates)	135	135	180	180	188	199½	203	221
" " (4th section order)	120	170	128	182	138	195½	150	212½
To Colo. com. points (present rates)	100	100	145	145	153	164½	168	186
" " " " (4th sec. order)	120	170	128	182	138	195½	150	212½
Currants—Dried.								
To Pacific coast terminals	120	180	120	180	120	180	120	180
To Salt Lake (present rates)	88	153	115	198	136	220½	151	242
" " (Salt Lake order)	119	142	139	172	160	200½	174	222
" " (4th section order)	120	180	128	193	138	207	150	225

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TABULATED STATEMENT—Continued.

CURRENT FREIGHT RATES COMPARED WITH MAXIMUM RATES UNDER THE I. C. C. ORDERS IN THE SALT LAKE AND FOURTH SECTION CASES—Contd.

	In cents per 100 lbs.							
	From zone 1.		From zone 2.		From zone 3.		From zone 4.	
	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.
To Grand Jct. (present rates)	140	190	160	220	180	248½	195	270
" " (4th section order)	120	180	128	193	138	207	150	225
To Canon City (present rates)	89	109	109	139	129	167½	144	180
" " (4th section order)	120	180	128	193	138	207	150	225
361 To Colo. com. points (present rates)	56	80	85	110	105	138½	120	160
" " " " (4th sec. order)	120	180	128	193	138	207	150	225
Door hangers and track.								
To Pacific coast terminals	110	175	110	175	110	175	110	175
To Salt Lake (present rates)	106	153	133	198	147½	213	160	230
" " (Salt Lake order)	83	142	110	172	128	193	140	210
" " (4th section order)	110	175	118	187	126½	201	137½	219
To Grand Jct. (present rates)	110	190	127	220	144½	241	157	258
" " (4th section order)	110	175	118	187	126½	201	137½	219
To Canon City (present rates)	71	109	88	139	105½	160	118	177
" " (4th section order)	110	175	118	187	126½	201	137½	219
To Colo. com. points (present rates)	50	80	67	110	84½	131	97	148
" " " " (4th sec. order)	110	175	118	187	126½	201	137½	219
Dry glue.								
To Pacific coast terminals	85	135	85	135	85	135	85	135
To Salt Lake (present rates)	128	153	160	198	173½	213	186	230
" " (Salt Lake order)	68	142	85	172	103	193	115	210
To Salt Lake (4th section order)	85	135	91	144	98	155	106	169
362 To Grand Jct. (present rates)	140	190	160	220	176½	241	189	258
" " (4th section order)	85	135	91	144	98	155	106	169
To Canon City (present rates)	89	109	109	139	125½	160	138	177
" " (4th section order)	85	135	91	144	98	155	106	169
To Colo. com. points (present rates)	65	80	85	110	101½	131	114	148
" " " " (4th sec. order)	85	135	91	144	98	155	106	169
Dye woods.								
To Pacific coast terminals	110	160	110	160	110	160	110	160
To Salt Lake (present rates)	128	153	160	198	173½	220½	186	242
" " (Salt Lake order)	119	142	139	172	156½	200½	169	222
" " (4th section order)	110	160	118	171	126½	184	137½	200
To Grand Jct. (present rates)	140	190	160	220	176½	248½	189	270
" " (4th section order)	110	160	118	171	126½	184	137½	200
To Canon City (present rates)	89	109	109	139	125½	167½	138	189
" " (4th section order)	110	160	118	171	126½	184	137½	200
363 To Colo. com. points (present rates)	65	80	85	110	101½	138½	114	160
" " " " (4th sec. order)	110	160	118	171	126½	184	137½	200
Fibre ware.								
To Pacific coast terminals	135	190	135	190	135	190	135	190
To Salt Lake (present rates)	128	175	160	240	177	269½	192	301
" " (Salt Lake order)	119	162	139	207	160	245½	174	277
" " (4th section order)	135	190	144	203	155	218½	169	237½
To Grand Jct. (present rates)	140	225	160	270	180	308½	195	340
" " (4th section order)	135	190	144	203	155	218½	169	237½
To Canon City (present rates)	89	135	109	180	129	218½	144	250
" " (4th section order)	135	190	144	203	155	218½	169	237½
To Colo. com. points (present rates)	65	100	85	145	105	183½	120	215
" " " " (4th sec. order)	135	190	144	203	155	218½	169	237½
Incandescent lamps.								
To Pacific coast terminals	200	300	200	300	200	300	200	300
To Salt Lake (present rates)	307½	307½	427½	427½	421½	469	443	516
" " (Salt Lake order)	285	285	367½	367½	378	425½	399½	472½
" " (4th section order)	200	300	214	321	230	345	250	375
364 To Grand Jct. (present rates)	397½	397½	480	480	490½	538	512	585
" " (4th section order)	200	300	214	321	230	345	250	375
To Canon City (present rates)	247½	247½	330	330	340½	388	362	435
" " (4th section order)	200	300	214	321	230	345	250	375
To Colo. com. points (present rates)	187½	187½	270	270	280½	328	302	375
" " " " (4th sec. order)	200	300	214	324	230	345	250	375

TABULATED STATEMENT—Continued.

CURRENT FREIGHT RATES COMPARED WITH MAXIMUM RATES UNDER THE I. C. C. ORDERS IN THE SALE LAKE AND FOURTH SECTION CASES—Contd.

	In cents per 100 lbs.							
	From zone 1.		From zone 2.		From zone 3.		From zone 4.	
	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.
Iron vises.								
To Pacific coast terminals	110	175	110	175	110	175	110	175
To Salt Lake (present rates)	175	175	240	240	235½	243	248	260
" " (Salt Lake order)	88	162	110	207	128	219	140	236
" " (4th section order)	110	175	118	187	126½	201	137½	219
To Grand Jct. (present rates)	225	225	270	270	274½	282	287	299
" " (4th section order)	110	175	118	187	126½	201	137½	219
To Canon City (present rates)	135	135	180	180	184½	192	197	209
" " (4th section order)	110	175	118	187	126½	201	137½	219
365 To Colo. com. points (present rates)	100	100	145	145	149½	157	162	174
" " " " (4th sec. order)	110	175	118	187	126½	201	137½	219
Jelly glasses.								
To Pacific coast terminals	75	170	85	170	85	170	85	170
To Salt Lake (present rates)	85	153	112	198	129½	225	142	248
" " (Salt Lake order)	96	142	120	172	137½	205	150	227
" " (4th section order)	75	170	91	182	98	195½	106	212½
To Grand Jct. (present rates)	110	190	127	220	144½	253	157	276
" " (4th section order)	75	170	91	182	98	195½	106	212½
To Canon City (present rates)	71	109	88	139	105½	172	118	195
" " (4th section order)	75	170	91	182	98	195½	106	212½
To Colo. com. points (present rates)	50	80	67	110	84½	143	97	166
" " " " (4th sec. order)	75	170	91	182	98	195½	106	212½
Picks and mattocks.								
To Pacific coast terminals	125	175	125	175	125	175	125	175
To Salt Lake (present rates)	130	153	175	198	187½	213	200	230
" " (Salt Lake order)	142	142	172	172	185½	193	198	210
" " (4th section order)	125	175	134	187	144	201	156	219
366 To Grand Jct. (present rates)	190	190	220	220	223½	241	246	258
" " " (4th section order)	125	175	134	187	144	201	156	219
To Canon City (present rates)	109	109	139	139	152½	160	165	177
" " (4th section order)	125	175	134	187	144	201	156	219
To Colo. com. points (present rates)	80	80	110	110	123½	131	136	148
" " " " (4th sec. order)	125	175	134	187	144	201	156	219
Poultry food.								
To Pacific coast terminals	60	125	60	125	60	125	60	125
To Salt Lake (present rates)	50	128	77	160	88	177	98½	192
" " (Salt Lake order)	48	119	60	139	75	160	85	174
" " (4th section order)	60	125	64	134	69	144	75	156
To Grand Jct. (present rates)	85	140	103	160	114½	180	125	195
" " (4th section order)	60	125	64	134	69	144	75	156
To Canon City (present rates)	58	89	76	109	87½	129	98	144
" " (4th section order)	60	125	64	134	69	144	75	156
367 To Colo. com. points (present rates)	45	65	63	85	74½	105	85	120
" " " " (4th sec. order)	60	125	64	134	69	144	75	156
Skillets and spiders.								
To Pacific coast terminals	120	170	120	170	120	170	120	170
To Salt Lake (present rates)	106	128	133	160	147½	181	160	198
" " (Salt Lake order)	96	119	120	139	137½	163	150	179
" " (4th section order)	120	170	128	182	138	195½	150	212½
To Grand Jct. (present rates)	110	140	147	160	144½	184	157	201
" " (4th section order)	120	170	128	182	138	195½	150	212½
To Canon City (present rates)	71	89	88	109	105½	133	118	150
" " (4th section order)	120	170	128	182	138	195½	150	212½
To Colo. com. points (present rates)	50	65	67	85	84½	109	97	126
" " " " (4th sec. order)	120	170	128	182	138	195½	150	212½
Sidewalk—Glass and iron combined.								
To Pacific coast terminals	115	140	115	140	115	140	115	140
To Salt Lake (present rates)	106	128	133	160	147½	188½	160	210
" " (Salt Lake order)	98	119	115	139	133	169	145	189
" " (4th section order)	115	140	123	150	132	161	144	175

TABULATED STATEMENT—Continued.

CURRENT FREIGHT RATES COMPARED WITH MAXIMUM RATES UNDER THE I. C. C. ORDERS IN THE SALE LAKE AND FOURTH SECTION CASES—Contd.

	In cents per 100 lbs.							
	From zone 1.		From zone 2.		From zone 3.		From zone 4.	
	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.	C. L.	L. C. L.
368 To Grand Jct. (present rates)	110	140	127	160	144½	191½	157	213
" " " (4th section order)	115	140	123	150	132	161	144	175
To Canon City (present rates)	71	89	88	109	105½	140½	118	162
" " (4th section order)	115	140	123	150	132	161	144	175
To Colo. com. points (present rates)	50	65	67	85	84½	116½	97	138
" " " " (4th sec. order)	115	140	123	150	132	161	144	175
Soap.								
To Pacific coast terminals	80	130	80	130	80	130	80	130
To Salt Lake (present rates)	84	128	110	160	127½	181	140	198½
" " (Salt Lake order)	64	119	80	139	98	163	110	179
" " (4th section order)	80	130	86	139	92	149½	100	162½
To Grand Jct. (present rates)	92	140	119	160	136½	184	149	201½
" " (4th section order)	80	130	86	139	92	149½	100	162½
To Canon City (present rates)	61	89	88	109	105½	133	118	150½
" " (4th section order)	80	130	86	139	92	149½	100	162½
369 To Colo. com. points (present rates)	40	65	67	85	84½	109	97	126½
" " " " (4th sec. order)	80	130	86	139	92	149½	100	162½
Window glass.								
To Pacific coast terminals	90	125	90	125	90	125	90	125
To Salt Lake (present rates)	93	128	120	160	137½	181	150	198
" " (Salt Lake order)	72	119	90	139	108	163	120	179
" " (4th section order)	90	125	96	134	103½	144	112½	156
To Grand Jct. (present rates)	92½	140	119½	160	137	184	149½	201
" " (4th section order)	90	125	96	134	103½	144	112½	156
To Canon City (present rates)	58½	89	85½	109	103	133	115½	150
" " (4th section order)	90	125	96	134	103½	144	112½	156
To Colo. com. points (present rates)	37½	65	64½	85	82	109	94½	126
" " " " (4th sec. order)	90	125	96	134	103½	144	112½	156
Witch hazel.								
To Pacific coast terminals	150	200	150	200	150	200	150	200
To Salt Lake (present rates)	145	175	190	240	192½	250½	205	272
" " (Salt Lake order)	120	162	150	207	166½	226½	179	248
" " (4th section order)	150	200	160½	214	172½	230	187½	250
370 To Grand Jct. (present rates)	205	225	250	270	262½	289½	275	311
" " (4th section order)	150	200	160½	214	172½	230	187½	250
To Canon City (present rates)	115	135	160	180	172½	199½	185	221
" " (4th section order)	150	200	160½	214	172½	230	187½	250
To Colo. com. points (present rates)	80	100	125	145	137½	164½	150	186
" " " " (4th sec. order)	150	200	160½	214	172½	230	187½	250
Wooden hames.								
To Pacific coast terminals	100	135	100	135	100	135	100	135
To Salt Lake (present rates)	106	128	138	160	153	188½	165½	210
" " (Salt Lake order)	80	119	100	139	118	169	130	189
" " (4th section order)	100	135	107	144	115	155	125	169
To Grand Jct. (present rates)	120	140	140½	160	156½	191½	169	213
" " (4th section order)	100	135	107	144	115	155	125	169
To Canon City (present rates)	78	89	98½	109	114½	140½	127	162
" " (4th section order)	100	135	107	144	115	155	125	169
371 To Colo. com. points (present rates)	60	65	80½	85	96½	116½	109	138
" " " " (4th sec. order)	100	135	107	144	115	155	125	169

In this exhibit Kansas City rates are used to represent the present rates from zone 1; Chicago rates zone 2; Buffalo rates, zone 3; and New York rates, zone 4.

Compiled in the accounting department, D. & R. G. R. R. Denver Colorado, Sept. 30, 1911.

F. M. DEWEES,
Auditor Freight Receipts.

372 *Order permitting Interior Counties Freight Bureau of Southern California to intervene.*

Entered October 20, 1911.

No. 50.

In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY Company et al., petitioners,
v.
UNITED STATES OF AMERICA, RESPONDENTS.

Order of intervention.

The petition and application of the Interior Counties Freight Bureau of Southern California and Maricopa County Commercial Club, of Phoenix, Arizona, coming on to be heard and determined by this court, and it appearing to the satisfaction of this court that the matters and things alleged and set forth in the petition in intervention of said parties are sufficient to entitle the said petitioners to intervene and appear herein and become parties to this action as of right, and to be represented by their counsel:

Wherefore, it is hereby ordered that the Interior Counties Freight Bureau of Southern California and Maricopa County Commercial Club, of Phoenix, Arizona, be, and are, and each of them is hereby permitted to appear as parties herein and hereto, and to intervene in this action as of right, and be represented by their counsel, and to take such action and such part in this proceeding and action as they may determine, subject to the provisions of the law, in such cases made and provided, and the rules and practice of this court.

Done in open court this 19th day of October, A. D. 1911.

MARTIN A. KNAPP,
Presiding Judge.

373 *Affidavit of Byron Waters.*

Filed October 20, 1911.

In the United States Commerce Court.

October session, 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., petitioners,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission et al., intervening respondents.

No. 50.

UNITED STATES OF AMERICA,
City of Washington, District of Columbia, ss:

BYRON WATERS, being first duly sworn, upon his oath deposes and says that he has read the petition of the original petitioners herein and has also read the affidavits in support of an application for an

injunction herein; that affiant has been attorney for intervener, Interior Counties Freight Bureau, of Southern California, ever since the 15th day of March, 1911, and has attended all of the hearings by and before the Interstate Commerce Commission in the proceedings instituted before it, Nos. 205, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, and 1575, which hearings were had on the 20th day of March, 1911, until the 1st day of April, 1911, and had for their object relief of the petitioners in this action from the long and short haul provision of section 4 of the Interstate Commerce Act, and both these interveners produced before the said Interstate Commerce Commission evidence, both oral and documentary, in opposition to any relief being granted in said proceeding to the said carriers, such evidence having relation particularly to the facts setting forth and describing the transportation conditions in southern California and in that part of the Territory of Arizona, the cities of Phoenix and Tempe; that with respect to the volume of freight
374 traffic upon the said railroads in the territory represented by said Interior Counties Freight Bureau of Southern California there was, on behalf of said bureau, presented to the Interstate Commerce Commission and introduced in evidence therein, a printed report by stations and months of all freight cars ordered by shippers for loading, or placed by the railroad company for unloading by the shipper, or held on order of the shipper for diversion or reconsignment, from September, 1909, to January, 1911, on the Atchison, Topeka & Santa Fe Railway Company, the Southern Pacific Railway Company, and the San Pedro, Los Angeles & Salt Lake Railroad Company, within the counties of San Bernardino, Riverside, Orange, and Imperial, California, which report showed an aggregate of cars in and out, to and from, such stations, of 131,688 cars devoted to the traffic of such stations, a copy of which report is annexed to this affidavit, marked "Exhibit A;" also, there was offered and received in evidence by said Freight Bureau at said hearing a statement showing general statistics of the counties of San Bernardino, Riverside, Orange, and Imperial, compiled from the reports furnished the secretary of the State agricultural society for the year 1910, in accordance with an act of the State legislature approved April 12, 1897, together with a showing of population of said counties compiled from the United States census of 1910, and showing the number of carloads of citrus fruits shipped and the average amount of freight paid thereon, compiled from data received from the Southern California Fruit Exchange, the truth of the facts therein stated being shown by oral testimony, a copy of which document is hereto annexed, marked "Exhibit B;" from which it appears among other things that in the territory represented by said Freight Bureau there is furnished to the carriers, the petitioners hereinbefore named, an annual number of carloads of eastbound freight from San Bernardino County of 12,000 cars, paying freight of about $3,974,400.00, and the county of Riverside 7,500 cars, paying freight of $2,484,000.00,

and from Orange County 1,960 cars, paying freight of $649,152.00, making an aggregate of freight paid per annum of $7,107,552.00, plus refrigeration charges of $65.00 per car, making an additional amount paid the carriers of $697,450.00. The population of the section represented by the Freight Bureau is shown by said Exhibit B to aggregate 149,429, as per United States census of 1910.

The product of the industry of this people is mainly marketed by means of transportation over the railroads for long
375 distances, and also the larger proportion of the food, raiment, and personal property bought by them is brought west over these lines from places of manufacture east of the Missouri River. Out of this situation of fact arises the interest of the people represented by said Freight Bureau in this controversy.

That if the preliminary injunction asked for by petitioners herein should be granted by this court, the shippers by rail over the lines of said railroads will thereby be allowed unjustly to collect from such shippers many small sums aggregating a large sum of money, and the granting of such injunction will continue the infliction of the wrongs upon all such shippers represented by said bureau and the people of said section, which wrongs are described and set forth in the reports of the Interstate Commerce Commission, set out in the original petition herein; and the granting of such injunction will cause many of such freight payments which will be so exacted by the carriers thereunder from the public to be voluntarily made, and made under such circumstances that the refunding of the same cannot be enforced in favor of such persons so paying the same even though this court should finally determine that such injunction had been improperly issued herein, or even though it should be finally determined upon appeal that such injunction had been improperly issued.

BYRON WATERS.

Subscribed and sworn to before me, this 19th day of October, 1911.

[SEAL.] H. S. MILSTEAD,
Notary Public, residing at Washington,
District of Columbia, United States of America.

376 *Report, by stations and months, of all freight cars ordered by shippers for unloading, or placed by railroad company for unloading by shipper, or held on order of shipper for diversion or reconsignment, from September, 1909, to January, 1911, of the Atchison, Topeka and Santa Fe Railroad Company, Southern Pacific Railroad Company, San Pedro, Los Angeles and Salt Lake Railroad Company, within the counties of San Bernardino, Riverside, Orange, and Imperial, California.*

376a ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY.

Stations.	1909				1910											Total.
	September.	October.	November.	December.	January.	February.	March.	April.	May.	June.	July.	August.	September.	October.	November.	December.	
Alessandro	7	21	21	28	37	7	32	32	41	90	64	56	47	11	12	12	518
Anaheim	76	62	44	38	31	36	42	32	31	46	58	59	62	54	54	96	821
Arlington	91	53	54	82	164	158	190	145	182	123	106	112	43	36	110	169	1,818
Arrowhead	3	6	14	10	15	25	8	9	11	14	13	7	4	6	12	18	175
Cajon	1		1	1	2									3	3	4	15
Casa Blanca	69	39	16	72	84	149	146	175	128	79	31	18	15	26	11	98	1,156
Colton	570	574	608	489	511	519	554	573	506	629	529	629	436	426	544	547	8,644
Corona	309	348	263	278	396	441	518	546	490	547	398	378	340	351	370	332	6,305
Devore	15	7	7	7			6			3	3	8	16	6			78
East Highlands	66	45	10	55	76	142	158	118	108	63	8	44	24	33	23	124	1,097
Elsinore	155	185	142	78	67	103	118	136	86	144	114	135	91	6	123	111	1,794
El Toro	85	27	9	22	47	11	29	11	54	22	14	56	30	32	8	11	468
Ethanac	12	24	22	20		69	27	25	65		56	32		7	89	51	568
Etiwanda	59	120	41	8	2	32	42	15	16	15	23	25	23	7	10	25	463
Fullerton	211	235	152	110	114	142	220	215	200	164	118	108	122	185	140	202	2,638
Hemet	55	44	58	29	44	51	99	49	89	120	54	145	55	40	54	52	1,038
Hesperia	22	16	14	13	8	9	12	5	15	14	9	6	11	9	10	7	180
Highgrove	21	19	11	18	40	26	44	39	25	21	8	24	23	44	24	59	446
Highland	47	59	51	94	160	177	228	173	94	98	51	44	31	36	54	224	1,621
Irvine	115	154	16	32	23	39	13	11	17	21	3	8	195	94	100	8	849
Keenbrooke											1	1				2	4
Mentone	4	6	5	27	63	43	57	23	164	75	39		30	6	13	20	575
Murrieta	34	23	16	11	22	20	36	27	13	22	20		25	21	12	33	335
North Cucamonga	157	84	27	34	19	57	92	134	109	77	120	109	107	101	38	48	1,313
Olinda	410	292	347	389	331	343	348	334	353	369	478	481	363	436	417	387	6,078
Olive	58	13					27	19	41	12	12	36	23	27	23	19	310
Orange	155	147	119	152	133	95	141	64	121	97	59	164	88	121	126	251	2,033
Oro Grande	78	153	82	74	74	48	152		172	74	97	78	63	28	103	68	1,344
Pachappa	29	16	35	24	71	102	98	81	55	37	36	32	20	16	21	68	741
Patton	44	18	20	17	15	26	10	24	21	16	17	11	7	10	5	11	272
Perris	223	57	61	50	29	65	98	44	62	150	115	115	52	124	77	176	1,498
Prado	165	162	176	114	126	119	127	140	117	168	156	135	156	104	152	161	2,278
Prenda	86	109	109	96	144	58	155	179	146	127	116	119	51	129	135	247	2,006
Redlands	157	195	155	156	190	317	328	278	179	184	139	158	168	161	162	274	3,201
Rialto	33	67	44	73	84	93	127	90	167	179	103	42	43	52	58	85	1,340
Richfield	16	22		1		5	8	5		4	8	8	15	12	2	1	109
Riverside	189	159	123	110	213	284	388	376	357	329	241	347	349	424	430	446	4,765
Rochester	4	16	1	1							4		7	8			41

San Bernardino	259	193	115	123	152	167	186	119	143	159	227	202	223	239	221	134	2,862
San Jacinto	22	19	31	15	32	26	40	34	23	9	52	56	44	30	24	12	469
San Juan-Capistrano	21	58	44	18	8	12	3	9	26	37	15	46	33	25	12	6	373
Santa Ana	147	169	139	108	100	105	91	56	64	116	120	139	113	165	131	72	1,835
Summit																	
Temecula	103	81	28	27	21	14	16	31	18	35	89	40	40	26	15	15	599
Upland	129	168	129	157	223	196	332	374	383	376	190	205	130	122	198	239	3,551
Val Verda	129	38	18	10	16	14	16	12	15	53	78	47	47	36	14	21	564
Victorville	20	12	19	13	7	12	16	19	15	18	19	13	22	10	27	35	277
Winchester	76	75	34	31	15	42	38	16	15	6	31	54	21	6	12	11	483
Total	4,737	4,390	3,432	3,315	3,910	4,399	5,416	4,797	4,937	4,942	4,242	4,532	3,808	3,920	4,179	4,992	69,948

376b

SOUTHERN PACIFIC RAILROAD COMPANY.

Anaheim	110	128	117	31	26	46	47	45	18	81	102	87	85	48	22	53	1,046
Banning	25	72	16	11	18	14	22	13	15	49	73	38	2	48	6	10	432
Beaumont	31	36	21	26	14		31	32	17	20	50	37	21	14	16	18	384
Bloomington	8	1	6	6	37	29	20	22	23	52	27	6	12	10	11		270
Brawley	32	47	63	69	71	40	53	67	115	485	100	32	29	57	46	46	1,352
Calexico	21	18	31	55	49	65	68	69	34	76	67	15	71	64	66	90	859
Chino	712	713	136	65	92	146	112	107	85	114	327	927	698	813	407	137	5,591
Coachella	6	8	20	7	8	9	7	18	11	11	17	1	2	1	13	2	141
Colton	470	479	473	443	419	375	377	442	474	723	541	633	640	535	430	490	7,944
Crafton	77	89	24	22	42	41	64	98	104	94	96	96	84	68	37	73	1,109
Cucamonga	68	71	58	47	33	32	59	51	40	51	80	98	67	58	76	62	951
Declez	252	134	38	30	42	38	28	31	36	54	48	28	1		1		761
El Centro	78	75	54	43	91	105	123	116	193	150	126	85	72	122	136	246	1,815
Glamis	1	2	2	3	6	2	3						2	7	1	1	30
Highgrove	36	15	17	11	70	41	56	60	107	54	29	14	13	21	21	38	603
Imperial and Junction	62	137	92	103	163	129	136	118	144	110	109	64	51	51	27	50	1,486
Indio	1	3	3	4		3	3		4	2	3				5	1	32
Los Alamitos	321	334	373	137	144	134	138	104	172	111	113	280	224	539	416	200	3,740
Mecca	2	2	4	5	5	2	5	2	2	4		2	2		8	6	51
Newport Beach	34	32	21	11	12	8	6	11	17	16	28	22	18	17	7	17	277
Ontario	67	83	66	63	156	125	155	156	130	101	121	158	104	114	127	135	1,861
Orange (West)		5	2	4	1	2	3		2	1	3	1	5	1	1	2	33
Palm Springs	2	1	2	3	1	3	1	3	20	1	1					5	43
Pomona	205	183	132	159	285	202	264	201	166	103	202	312	192	164	128	230	3,128
Redlands	63	58	62	190	349	348	527	575	478	227	147	132	57	74	94	383	3,764
Redlands Junction	43	36	15	55	54	92	120	120	87	102	37	43	35	38	19	87	983
Riverside	159	97	97	126	242	370	441	555	495	353	305	412	324	403	393	417	5,189
Salton						1		1						3		1	6
San Bernardino	63	51	53	59	47	68	60	23	6		17	92	30	28	49	37	683
Santa Ana	133	211	131	102	72	101	96	77	88	66	103	106	91	85	71	56	1,589
Thermal	11	13	18	18	24	10	7	4	25	26	28		9	5	20	9	227
Tustin	37	70	73	46	43	30	64	33	53	37	41	22	68	45	22	117	801
West Anaheim	8	34	37	21	17	24	17	25	26	26	32	24	21	24	7	36	379
Total	3,138	3,238	2,257	1,975	2,573	2,635	3,113	3,179	3,187	3,300	2,973	3,767	3,030	3,457	2,683	3,055	47,560

Report, by stations and months, of all freight cars ordered by shippers for unloading, or placed by railroad company for unloading by shipper, or held on order of shipper for diversion or reconsignment, from September, 1909, to January, 1911, of the Atchison, Topeka and Santa Fe Railroad Company, Southern Pacific Railroad Company, San Pedro, Los Angeles and Salt Lake Railroad Company, within the counties of San Bernardino, Riverside, Orange, and Imperial, California—Continued.

3766 SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY.

Stations.	1909				1910												Total.
	September.	October.	November.	December.	January.	February.	March.	April.	May.	June.	July.	August.	September.	October.	November.	December.	
Cima	1	1	1	2	3	1				2	1		4	1	1	2	20
Colton	49	79	38	41	34	11	13	15	19	25	20	83	118	35	67	51	698
Daggett	1								1		1		2	1			6
Highgrove	22	5	7	8	13	25	26	2		7	2	9	8	2	13	24	173
Keenbrook																	
Kelso													1	1			2
Leastalk																	
Nipton		3					1	1		1		1	1			1	9
Ontario	102	130	95	71	56	34	42	47	36	47	147	145	113	174	75	87	1,401
Otis	4	1	2	1							1			1	1		11
Pomona	172	200	196	170	183	208	181	181	215	199	228	287	271	365	266	213	3,535
Pedley	157	136	391	276	236	400	298	192	174	193		566	272	350	292	170	4,103
Riverside	104	52	62	69	82	123	190	108	195	280	300	333	249	273	191	108	2,719
San Bernardino	20	32	21	34	10	10	17	7	5		10	31	28	18	14	17	274
Wineville	84	144	66	71	49	65	30	41	43	36	56	68	153	103	83	77	1,229
Total	716	783	879	743	666	877	798	594	688	790	766	1,523	1,220	1,384	1,003	750	14,180

RECAPITULATION.

Atchison, Topeka & Santa Fe Railroad Company	69,948
Southern Pacific Railroad Company	47,560
San Pedro, Los Angeles & Salt Lake Railroad Company	14,180
Total	131,688

377 *General statistics of the counties of San Bernardino, Riverside, Orange, and Imperial, compiled from the reports furnished the secretary of the State agricultural society for the year 1910, in accordance with an act of the State legislature amended and approved April 12th, 1897, together with a showing of population of said counties compiled from the U. S. census of 1910, and showing the number of carloads of citrus fruit shipped and the average amount of freight paid thereon, compiled from data received from the Southern California Fruit Exchange.*

378 GENERAL STATISTICS, FISCAL YEAR 1910, OF SAN BERNARDINO, RIVERSIDE, ORANGE, AND IMPERIAL COUNTIES, STATE OF CALIFORNIA.

Population:		
San Bernardino County	56,706	
Riverside County	34,696	
Orange County	34,436	
Imperial County	13,591	
		149,429
Area in square miles:		
San Bernardino County	20,160	
Riverside	7,000	
Orange	7,800	
Imperial	4,000	
		38,960
Number of acres:		
San Bernardino County	12,902,400	
Riverside	4,480,000	
Orange	4,992,000	
Imperial	2,560,000	
		24,934,400
Number of farms:		
San Bernardino County	5,685	
Riverside		
Orange	4,783	
Imperial	4,200	
		14,668
Number of acres assessed:		
San Bernardino County	893,745	
Riverside	1,177,553	
Orange	443,247	
Imperial	621,953	
		3,136,498
Total assessed value of property:		
San Bernardino County	$49,899,287	
Riverside	22,218,835	
Orange	27,783,810	
Imperial	13,126,799	
		$113,028,731
379 Amount expended on roads:		
San Bernardino County	$184,105	
Riverside	136,607	
Orange	87,760	
Imperial	48,798	
		$457,270
Amount expended on bridges:		
San Bernardino County	$30,943	
Riverside	6,203	
Orange (in road expense).		
Imperial	26,012	
		$63,158
Number of miles of public road:		
San Bernardino County	2,169	
Riverside	2,000	
Orange (not given).		
Imperial	1,250	
		5,410

Road tax levy per $100:		
San Bernardino County	$ .45	
Riverside	.60	
Orange	.40	
Imperial	.40	
Value of county buildings:		
San Bernardino County	$460,000	
Riverside	388,437	
Orange	124,490	
Imperial	25,000	
		$997,927
Number of miles of aqueduct:		
San Bernardino County, 440 miles	$3,895,000	
Riverside, 132 miles	1,688,537	
Orange, 300 miles (value not given).		
Imperial, 900 miles	3,500,000	
		$9,083,537
Number of miles of steam railroads:		
San Bernardino County, 713 miles	$12,999,332	
Riverside, 210 miles	4,306,996	
Orange, 132 miles	1,238,028	
Imperial, 160 miles	3,380,349	
		$21,924,705
Number of miles of electric road:		
San Bernardino County, 53 miles	$185,805	
Riverside, miles	28,765	
Orange, 47 miles	782,510	
Imperial (not given).		
		$997,080
380 Number of electric power plants:		
San Bernardino County, two	$625,000	
Riverside, two	52,035	
Orange, one	171,180	
Imperial, one	70,640	
		$918,855
Number of miles of electric power lines:		
San Bernardino County, 206 miles	$325,525	
Riverside, 16.5 miles	3,555	
Orange, 47 miles	48,140	
Imperial, 34 miles	31,800	
		$409,020
Number of acres irrigated:		
San Bernardino County	49,900	
Riverside (not given).		
Orange	17,235	
Imperial	207,360	
		274,495
Number of acres in wheat, barley, oats, and corn:		
San Bernardino County, 7,300 acres	$80,875	
Riverside, 74,473 acres	502,696	
Orange, 46,185 acres	726,270	
Imperial, 52,071 acres	856,820	
		$2,166,661
Number of acres in hay and grain:		
San Bernardino County, 11,200 acres	$959,500	
Riverside, 48,888 acres	897,574	
Orange, 29,350 acres	200,904	
Imperial, 34,057 acres	1,205,456	
		$3,263,434
Number of fruit trees bearing:		
San Bernardino Co., 3,543,175 trees	$3,683,175	
Riverside, 1,483,419 trees	1,618,448	
Orange, 1,098,705 trees	1,347,425	
Imperial, 31,788 trees	31,788	
		$6,680,836

Number of almond and walnut trees:		
San Bernardino County, 8,300 trees	$9,800	
Riverside, 20,689 trees	17,160	
Orange, 152,200 trees	95,250	
Imperial (not given).		
		$122,210
Number of acres of grape vines:		
San B'dino Co., 22,870 acres (value not given).		
Riverside, 2,877 acres (value not given).		
Orange, 590 acres (value not given).		
Imperial, 1,000 acres (value not given).		
381 Number of acres of berries of all kinds:		
San Bernardino Co., 100 acres (value not given).		
Riverside, 8 acres (value not given).		
Orange, 310 acres (value not given).		
Imperial (value not given).		
Number of pounds of green fruit and vegetables:		
San Bernardino Co., 130,332,415 lbs	$6,910,159	
Riverside, 21,520,276 lbs	3,697,431	
Orange, 11,714,304 lbs	2,176,271	
Imperial, 6,810,000 lbs	472,840	
		$13,256,701
Number of pounds of dried fruit and vegetables:		
San Bernardino Co., 4,790,700 lbs	$179,565	
Riverside, 952,500 lbs	66,970	
Orange, 11,077,658 lbs	175,165	
Imperial		
		$421,700
Number of cases of canned fruit:		
San Bernardino Co., 153,255 cases	$312,510	
Riverside (no report).		
Orange, 40,028 cases	132,664	
Imperial (not given).		
		$445,174
Number of gallons of wines and brandies:		
San Bernardino Co., 2,452,000 gals	$411,500	
Riverside, 482,500 gallons	434,550	
Orange, 106,050 gallons	117,450	
Imperial (not given).		
		$963,500
Number of pounds of butter and cream:		
San Bernardino County, 180,000 lbs	$54,000	
Riverside, 686,523 lbs	255,583	
Orange, 415,902 lbs	138,985	
Imperial, 2,738,425 lbs	958,425	
		$1,406,993
Livestock in San Bernardino County:		
29,675 cattle, 15,268 horses, 500 mules, 8,900 hogs	$2,578,500	
Livestock in Riverside County:		
15,357 cattle, 3,352 horses, 517 mules, 1,886 hogs	655,102	
Livestock in Orange County:		
11,115 cattle, 8,945 horses, 2,037 mules, 1,037 hogs	1,663,124	
Livestock in Imperial County:		
17,774 cattle, 5,720 horses, 1,386 mules, 34,292 hogs	1,683,707	
		$6,580,433
382 Poultry—Chickens, ducks, and turkeys:		
848,975 doz. San Bernardino Co	$280,900	
433,304 doz. Rive'side County	166,492	
255,825 doz. Orange County	244,825	
130,524 doz. in Imperial County	47,337	
		$738,554
Number of sheep and pounds of wool:		
Riverside Co., 6,907 sheep, 20,000 pounds wool	$2,000	
Orange Co., 25,380 sheep, 216,360 pounds wool	107,393	
Imperial Co., 15,855 sheep, 140,000 pounds wool	115,365	
		$220,758

Forest products:		
San Bernardino Co., 574,000 acres	$364,200	
Riverside County (value not given).		
Orange County, 2,000 acres (value not given).		
Imperial County	460,299	
		$824,499
Number of cars oranges, lemons, and grape fruit:		
San Bernardino County, 12,000 cars at an average freight charge of $331.20	$3,974,400	
Riverside County, 7,500 cars at an average freight charge of $331.20	2,484,000	
Orange County, 1,960 cars at an average freight charge of $331.20	649,152	
		$7,107,552

Fifty per cent of the above number of cars goes under refrigeration at an average of $65.00 per car, making an additional expense to the grower of $697,450.00.

383 MISCELLANEOUS.

	San Bernardino County.	Riverside County.	Orange County.	Imperial County.
Alfalfa meal	$40,000			
Alfalfa seed	1,200	$4,590		
Apricot pits			$14,800	
Bees (hives)	40,250	31,089	25,500	$12,640
Beet pulp	42,500			
Beeswax	1,250	733	2,850	1,440
Cotton		22,500		775,000
Copper	15,000			
Crude oil			2,512,148	
Crushed rock	125,000	185,730		
Broom corn		750		
Flowers and plants	176,000	7,000	28,000	
Gold	175,000			
Honey	27,000	20,974	33,000	41,400
Lead	10,000			
Marble-dust	12,500			
Plaster	75,000			
Paving blocks	35,000			
Silver	20,000			
Sirup (gallons)	3,000			
Sugar beets (tons)	220,000			
Salt	50,000			
Tungsten	120,000			
Telephones, 84 miles				2,000
Telegraphs, 271 miles				38,448
Total	1,188,700	273,366	2,616,298	870,928

384 MANUFACTORIES.

Artificial stone pipe		$2,240		
Artificial stone	$11,500	20,500	$8,000	
Bookbinders	4,600	8,000		
Brick	21,000	28,000	110,000	$152,400
Cement	800,000	214,500		
Crushed rock		185,730		
Cigars	24,000	17,500	16,866	
Clothing	71,500			
Confectionery	63,000	45,000		62,250
Electric supplies	250,000			
Flouring mills	342,000		175,256	
Founders and iron works	260,000	143,500		
Feed mills	262,800			
Fertilizer	150,000			
Granite	4,500	24,975		
Hides				7,500
Ice	615,000	146,000	19,534	
Leathergoods	25,300			
Lime	150,000			
Machinery	606,575		125,000	
Meat products	90,200			80,316
Marble	35,000			

MANUFACTORIES—Continued.

	San Bernardino County.	Riverside County.	Orange County.	Imperial County.
Miscellaneous	$83,000			
Olive oil	95,000		$750	
Olive pickles	162,000		400	
Oil, refined	687,500			
Pressed brick		$269,000		
Planing mill	184,000	146,000	160,000	
Saw mills (3)	50,000			
Sash and door fact'r's (2)	21,000			
Sewer pipe	28,000			
Sand stone	3,000	78,361		
Sugar beets	1,485,000		1,740,000	
Tin and galvanized iron	117,000			
Wood boxes	205,000			
Total	$6,907,175	$1,271,105	$2,506,101	$302,466

385 OUTPUT.

Brick	3,400,000			1,080,000
Cement (tons)	80,000			
Cigars	440,000			
Flour (bbls.)	60,000			
Hides (pounds)	530,000			
Lard (pounds)	119,000			
Meat, packed	72,500			
Olive oil (gallons)	42,000			
Olive pickles (gallons)	180,000			
Tallow (bbls.)	800			

386 *Order permitting Chicago Association of Commerce to intervene.*

(Entered October 20, 1911.)

In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., petitioners,
v.
UNITED STATES OF AMERICA ET AL., RESPONDENTS. } No. 50.

ORDER.

On written application of the Chicago Association of Commerce, a corporation, by Cassoday, Butler, Lamb & Foster, its attorneys, leave is given the said Chicago Association of Commerce to file its intervening petition herein and to appear as an intervener and be represented by its counsel in the proceedings herein, the court reserving the right at any time hereafter upon objection being made or of its own motion to revoke the right of the said Chicago Association of Commerce to appear as such intervener and be represented by its counsel in the proceedings herein if the court shall upon such objection or on its own motion determine that the objection is well made or that the said intervener is without right to appear and be heard;

Leave is also given the Chicago Association of Commerce to file answer within twenty (20) days.

MARTIN A. KNAPP,
Presiding Judge.

387 *Affidavits.*

(Filed October 20, 1911.)

In the matter of the applications, Nos. 205, 342, 343, 344, 349, 350, and 352, on behalf of the Trans-Continental Freight Bureau, by R. H. Countiss, agent, for relief from the provisions of the fourth section of the act to regulate commerce as amended June 18, 1910, with respect to rates made from eastern points of shipment, which are higher to intermediate points than to Pacific coast terminals, and the order of the Interstate Commerce Commission made with respect to said applications, being the order of said commission known and designated as fourth section order No. 124.

STATE OF UTAH, *County of Salt Lake, ss:*

C. J. MCNITT, being first duly sworn, on oath, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and is now, and has been for the past ten years, auditor of the Oregon Short Line Railroad Company, a corporation organized under the laws of the State of Utah, and with his headquarters and general office in the city and county of Salt Lake and State of Utah, and makes this affidavit for and on behalf of said company.

That as such auditor he is in charge of, and there is kept under his supervision, all of the accounts of said Oregon Short Line Railroad Company with respect to showing the receipts and earnings of all traffic moving over the rails of said company. That as such auditor he is familiar with the original opinion of the Interstate Commerce Commission known as No. 1363, in case No. 879, entitled "City of Spokane, Washington, et al., *v.* Northern Pacific Railway Company et al.," rendered June 7, 1910; also opinion No. 1364 of said commission, being case No. 2662, entitled "Commercial Club Traffic Bureau of Salt Lake City, Utah, *v.* Atchison, Topeka & Santa Fe Railway Company et al.," rendered June 7, 1910; also opinion No. 1624 rendered by the said commission June 22, 1911, with reference to applications for relief under the fourth section in case No. 879 and No. 2662, aforesaid. That pursuant to the directions and suggestions contained in said opinions of June 7, 1910, there was prepared a statement of losses to carriers that would result from the application of the rates and schedules suggested by the commission in said opinions. That said statements were made up under the direction of this affiant and were verified by agents and representatives of the

388 Interstate Commerce Commission, known as examiners of accounts, working in connection with this affiant and his assistants. That this affiant is, therefore, familiar with the statement of losses as shown by the compilations thus made. That since said compilations were made up, as aforesaid, the commission has made and entered its order known as fourth section order No. 124, with which this affiant is familiar. That said order No. 124 provides

that the Missouri River-Pacific coast terminal rates shall be the maxima to all intermediate territory, and provides, further, a certain percentage bases for different zones east of Missouri River. That the current transcontinental tariffs contain approximately 3,500 commodity rates, about 1,500 of which apply on less than carload quantities, thus doing away with the ratings provided on such shipments under the western classification with class rates.

That to all territory on the lines of the Oregon Short Line Railroad Company no rates to-day are published through from points east of Chicago and Mississippi River, all rates basing upon the locals in and out of those basing points. That said order No. 124 contemplates the application of transcontinental terminal rates from all eastern defined territories, plus a certain percentage from different zones.

That practically all of the less than carload merchandise now moving under current western classification and class rates will be removed from that basis and included in the large transcontinental list of commodity rates on less than carload shipments, thus greatly depreciating the revenue of this carrier. These examples have reference only to what might be termed "direct" losses, but in a general adjustment of the rates, the revenues of the company will be greatly decreased by necessary adjustments from other territories which must be maintained in the recognized relation of rates; for example, reductions from the territories Missouri River and east will necessarily affect the rates from Colorado to all points on the Oregon Short Line Railroad Company. The same is true of the rates from Los Angeles, San Francisco, Portland, Tacoma, and Seattle, the rates from the west bearing certain relations to those from the east.

The application of these rates to the traffic moving over the rails of the said Oregon Short Line Railroad Company will materially and seriously diminish the revenues of said company; and while this affiant has not had time to have an exhaustive compilation of said losses prepared, as was originally made, and while it is impossible to tell just what the losses will be under said order No. 124, yet,
389 from his knowledge of what the losses would be under the original opinions heretofore referred to, and from his general knowledge of the business of said Oregon Short Line Railroad Company, and from the estimates that he is able to make by comparison of the said orders of the commission, it is his belief and opinion, and he therefore alleges the fact to be, that the losses to said company will greatly exceed the losses and diminution in revenue calculated and compiled under the original opinions heretofore referred to; and in the opinion of this affiant, from the information and data at his command, the loss and diminution to said company will be so great as to materially affect the revenue and earning capacity of said carrier.

C. J. McNITT.

Subscribed and sworn to before me this 29th day of September, 1911.

[SEAL.] L. B. SWANER, *Notary Public.*

(Endorsed:) United States Commerce Court. Filed Oct. 20, 1911. G. F. Snyder, clerk.

STATE OF OREGON,
County of Multonomah, ss:

I, R. BLAISDELL, being first duly sworn, on my oath depose and say: That I am the auditor of the Oregon-Washington Railroad & Navigation Company, and have been such auditor continuously since said company has been operating its railroads in December, 1910, and that I was prior to said date, for a continuous period of four years, the auditor of the predecessor in interest of said Oregon-Washington Railroad & Navigation Company, to wit, the Oregon Railorad and Navigation Company; that I have read and am familiar with the decision of the Interstate Commerce Commission in the case of city of Spokane, Washington, et al. versus Northern Pacific Railway Company et al., reported in 15 I. C. C. Rep., at pages 376 to 426; that I have read and am also familiar with the supplemental report of the Interstate Commerce Commission in the same case rendered on June 7, 1910, reported in 19 I. C. C. Rep., pages 162 to 217; that I have read and am familiar with the further report of said
390 Interstate Commerce Commission in said cause rendered on June 22nd, 1911, and have also read and am familiar with the order of said Interstate Commerce Commission made on July 31st, 1911, entitled "fourth section order No. 124" in the matter of the applications Nos. 205, 342, 343, 349, 350, and 352, on behalf of the Trans-Continental Freight Bureau, by R. H. Countiss, agent, for relief from the provisions of the fourth section of the act to regulate commerce, as amended June 18, 1910, with respect to rates made from eastern points of shipment which are higher to intermediate points than to Pacific coast terminals; that I, as auditor of the Oregon Railroad and Navigation Company, compiled statements of the revenue derived by said the Oregon Railroad and Navigation Company for a period of three months and required by said order of the Interstate Commerce Commission in its decision above referred to of June 7, 1910, and of the revenue which would have been derived during said period if the rates prescribed in said report of June 7, 1910, had been in force during said period, and that by said statement it appears that the loss of revenue to said the Oregon Railroad and Navigation Company, should the rates prescribed in said decision of June 7, 1910, be put into effect, would exceed the sum of one hundred forty-five thousand (145,000) dollars, annually; and that in case rates are established on the basis prescribed in said fourth section order No. 124 above referred to, provided the terminal rates are maintained on their present basis, the losses in revenue to the

Oregon-Washington Railroad & Navigation Company will greatly exceed the estimated losses which would occur to said company in case the rates prescribed in said decision of June 7, 1910, above referred to should be established; that such excess of loss under rates established on the basis of said fourth section order No. 124, over and above the basis prescribed by said decision of June 7, 1910, would amount to many thousands of dollars, and such excess of loss would exceed the sum of forty thousand (40,000) dollars annually.

R. BLAISDELL.

Subscribed and sworn to before me, this 10th day of October, 1911.

[SEAL.] JOHN P. HANNON,
Notary Public for Oregon.

391 *Journal entry.*

Proceedings of October 20, 1911.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., PETITIONERS.
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission et al., intervening respondents. } No. 50.

UNION PACIFIC RAILROAD CO. ET AL., PETITIONERS.
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission et al., intervening respondents. } No. 51.

(Causes heard together, but not consolidated.)

Said causes came on for hearing on the petitions for preliminary injunction in Nos. 50 and 51 and on the motion of the Interstate Commerce Commission to dismiss in No. 50, and the arguments of counsel were commenced, Mr. Charles Donnelly and Mr. F. C. Dillard appearing on behalf of the petitioners.

392 *Affidavit of A. D. McDonald.*

(Filed October 23, 1911.)

In the United States Commerce Court. October session, 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., petitioners.
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission et al., intervening respondents. } No. 50.

AFFIDAVIT OF A. D. McDONALD.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

A. D. McDONALD, being duly sworn, deposes and says: I am auditor of the Southern Pacific Company and have my office in the Flood Building, corner of Market and Powell Streets, in the city and county of San Francisco, State of California, where are located and

under my charge the books, records, accounts, and other data concerning the financial affairs and operations of said company, and particularly the books, records, and accounts relating to or connected with the operation and revenues of said company in,
393 upon, or connected with the lines of said company in what is known as "intermountain territory" and affected by the order or orders entered by the Interstate Commerce Commission in certain cases recently heard and determined by said body, of which complaint is made to the above-entitled court by the complainants in the above-entitled proceeding. I have caused an examination to be made of the same, and the statements hereinafter made are based upon the data compiled as a result of said examination.

The data and figures compiled by Mr. Edward C. Hall, official examiner of the Interstate Commerce Commission, assisted by the auditor of freight accounts of said Southern Pacific Company, showing the revenue and losses on transportation conducted in part by said company from all eastern defined territory to points west of Ogden, State of Utah, by direct and indirect routes, was based on orders duly entered by the Interstate Commerce Commission in cases Nos. 1665 and 1796. My understanding of the orders entered by the said commission, of which complaint is made in the foregoing entitled action, is that they affect a heavy percentage of the through rates of said Southern Pacific Company within the territory between the Missouri River and Pacific coast terminals; that is to say, that they affect rates which are based on the terminal rates, plus the locals back to point of delivery, or all rates to intermediate points which are higher than terminal rates, and that in consequence they affect the rates in all territory traversed by the lines of said Southern Pacific Company where such an adjustment of rates prevails. If I am correct in thus interpreting the effect of the said orders, it is my judgment, from a consideration of the data heretofore referred to as having been compiled from records, accounts, and books in my office in which the revenue and disbursements within said territory are kept and recorded, that the additional losses produced by the enforcement of the said orders would be three times as great as shown in the tables compiled by Mr. Edward C. Hall, hereinbefore referred to. I could not make an exact statement of these losses without instituting a careful and exhaustive investigation of the books, records, and accounts of the said company, which would consume a great deal of time and cost a considerable sum of money, but I am safe, I think, in making the foregoing statement of the probable effect of the said orders.

A. D. McDONALD.
Auditor Southern Pacific Company.

394 Subscribed and sworn to before me this 6th day of October, 1911.

[SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

395 *Journal entry.*

Proceedings of October 23, 1911.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION ET AL., INTERVENING RESPONDENTS. } No. 50.

UNION PACIFIC RAILROAD CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION ET AL., INTERVENING RESPONDENTS. } No. 51.

Said causes came on for further hearing on the petitions for preliminary injunction in Nos. 50 and 51, and on the motion of the Interstate Commerce Commission to dismiss in No. 50, and the arguments of counsel were continued; Mr. F. C. Dillard appearing on behalf of the petitioners, Mr. Joseph N. Teal on behalf of the coast cities of Portland, Ore., and Seattle and Tacoma, Wash., and Mr. P. J. Farrell on behalf of the Interstate Commerce Commission.

396 *Motion of United States to dismiss.*

(Filed October 24, 1911.)

In the United States Commerce Court, October session, 1911.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., PETITIONERS,
v.
THE UNITED STATES, RESPONDENT. } No. 50.

MOTION TO DISMISS.

In this cause the United States moves to dismiss the original petition, because—

1. Section 4 of the interstate commerce act, as amended by the act of June 18, 1910 (36 Stat., 539, 547), is constitutional.

2. The petition upon its face shows that the Interstate Commerce Commission had jurisdiction of the subject matter involved; that in proceedings properly begun and prosecuted an investigation of the entire subject was had by the commission; that the orders in question were based upon such proceedings and investigation, and that in promulgating said orders the commission was acting within the scope of its authority.

3. The petition fails to show that a compliance with said orders, or either of them, would reduce the net earnings of petitioners, or either of them, to such an extent as to deprive them, or either of
397 them, of their property within the meaning of the fifth amendment to the Constitution of the United States.

4. The relief sought is that an order of the Interstate Commerce Commission, promulgated under section 4 of the interstate commerce act, be declared void, and that an injunction against the carrying into effect of said order be granted, when, in the absence of an order of the commission the prohibition of said section becomes absolute, and the injunctive relief can not be granted; and, therefore, there is presented to this court only an academic question, of which it will not take jurisdiction.

5. The petition contains no equities upon its face justifying any relief sought by petitioners.

J. A. FOWLER,
Assistant to the Attorney General.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

398 *Journal entry.*

Proceedings of October 24, 1911.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission et al., intervening respondents. } No. 50.

UNION PACIFIC RAILROAD CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission et al., intervening respondents. } No. 51.

Said causes came on for further hearing on the petitions for preliminary injunction in Nos. 50 and 51 and on the motion of the Interstate Commerce Commission to dismiss in No. 50, and the arguments of counsel were continued; Mr. P. J. Farrell appearing on behalf of the Interstate Commerce Commission, Mr. James A. Fowler on behalf of the United States, Mr. H. M. Stephens on behalf of interveners, City of Spokane et al., and Mr. Byron Waters on behalf of interveners, Interior Counties Freight Bureau of Southern California et al.

399 *Petition of intervention.*

(Filed October 25, 1911.)

In the Commerce Court of the United States.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, UNION Pacific Railroad Company, et al., *vs.* UNITED STATES OF AMERICA.	No. 50.
UNION PACIFIC RAILROAD COMPANY, OREGON-WASHINGTON Railroad & Navigation Company, et al., *vs.* UNITED STATES OF AMERICA.	No. 51.
DENVER & RIO GRANDE RAILROAD COMPANY, ATCHISON, Topeka & Santa Fe Railway Company, et al., *vs.* UNITED STATES OF AMERICA.	No. 52.

To the honorable judges of the Commerce Court of the United States:

The petition of Giroux Consolidated Mines Company, a corporation organized under the laws of the State of Delaware, respectfully shows:

First. That it is complainant in a proceeding pending before the Interstate Commerce Commission, under the style and title of Giroux Consolidated Mines Company vs. Nevada Northern Railway
400 Company et al., No. 3581, in which the question of rates in the territory known as "the intermountain territory" is involved, and on the seventh day of July, 1911, a hearing was had upon said petition at Duluth before a special examiner of the Interstate Commerce Commmission, and it was then determined by counsel for both plaintiff and defendants, and approved by the examiner, that the questions involved in the case could not be properly heard and determined until the decision of what are known as the "intermountain cases" by the Interstate Commerce Commission, which cases were decided by the Interstate Commerce Commission in its two supplemental reports of June 22, 1911, referred to in the several bills in the above three cases, pending in this court.

Second. Your petitioner therefore shows that it is a complainant before the Interstate Commerce Commission, and is interested in the above-styled cases pending in this court, wherein bills have been filed attacking the orders entered by the Interstate Commerce Commission on the 22nd of June, 1911, as aforesaid, and petitioner prays that it may have the right to appear in the three cases above set forth

and be made a party defendant in each of said cases, and may be represented before the court by counsel.

And your petitioner will ever pray, etc.

GIROUX CONSOLIDATED MINES COMPANY,
By WM. A. GLASGOW, Jr., *Counsel.*

401 *Order permitting Giroux Consolidated Mines Co. to intervene.*

(Entered October 25, 1911.)

In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al., petitioners,
v.
UNITED STATES OF AMERICA, RESPONDENT.
} Suit No. 50.

Upon reading the petition of Giroux Consolidated Mines Company to be made an intervening party respondent in the above-entitled cause,

It is ordered that the said Giroux Consolidated Mines Company be and is hereby made an intervening party respondent in the above-entitled cause, with all of the rights of original respondents to appear, plead, answer, and be represented by its counsel.

For the court:

MARTIN A. KNAPP,
Presiding judge.

In open court, this twenty-fifth day of October, A. D. 1911.

402 *Journal entry.*

Proceedings of October 25, 1911.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission et al., intervening respondents.
} No. 50.

UNION PACIFIC RAILROAD CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission et al., intervening respondents.
} No. 51.

Said causes came on for further hearing on the petitions for preliminary injunction in Nos. 50 and 51, and on the motion of the Interstate Commerce Commission to dismiss in No. 50, and the arguments of counsel were concluded, Mr. James A. Fowler, assistant to the Attorney General, appearing on behalf of the United States, and Mr. Robert Dunlap on behalf of the petitioners. Thereupon, the causes wer taken under advisement by the court.

403 *Letter from William Ellis.*

(Filed October 26, 1911.)

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.,
(William Ellis, commerce counsel.) LEGAL DEPARTMENT,
Chicago, October 23, 1911.

CLERK OF COMMERCE COURT,
Washington, D. C.

DEAR SIR: May I ask you to withdraw my name as attorney of record in the intermountain cases which are pending in your court. As explained in a letter from Mr. Burton Hanson, general counsel of this company, I have never in any way participated in the conferences connected with these cases and have had nothing whatever to do with the drawing of the pleadings or any other proceedings in connection therewith, and it was through a misapprehension of the circumstances involved that I was put in these bills.

Very truly, yours,

WILLIAM ELLIS,
Commerce Counsel.

404 *Answer of Chicago Association of Commerce.*

(Filed November 9, 1911.)

In the United States Commerce Court,

October term, 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., petitioners,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } No. 50.

ANSWER OF INTERVENER, CHICAGO ASSOCIATION OF COMMERCE.

Comes now the intervener, Chicago Association of Commerce, and for answer to the petition of the original petitioners herein, says:

I.

This intervener admits the allegations contained in paragraph I of said petition.

II.

Admits the allegations contained in paragraph II of said petition.

405 III.

Admits the allegations contained in paragraph III of said petition.

IV.

Admits that freight carried over the lines of the petitioners has been divided or grouped into classes mentioned in paragraph IV, and that the class rates to the Pacific coast are as therein set forth; and denies each and every other allegation in said paragraph contained.

V.

Admits that some classes of freight can be and are transported by water from points on the Atlantic coast to the Pacific coast and from points on the Atlantic coast to the Isthmuses of Tehuantepec and Panama, and thence by rail to the Pacific coast of said isthmuses, and moving thence by sailing vessels or steamships to said Pacific coast terminals of the petitioners, as alleged in said paragraph V; and says that some classes of freight now carried all rail under class rates by petitioners do not and can not move to Pacific coast terminals by water; and denies every other allegation in said paragraph contained.

VI.

Admits that traffic moves in large volumes over the ocean to the Pacific coast ports from the Orient and other foreign countries, as alleged in paragraph VI, and denies that the rail carriers have made exceedingly low rates as alleged.

406

VII.

Admits that the lines of railway of the petitioners converge at the points mentioned in paragraph VII; and denies that the petitioners have made to said coast terminals less than reasonable rates for the transportation of traffic thereto, and denies every other allegation in said paragraph contained.

VIII.

Admits that the same rates from the Atlantic seaboard to the Pacific coast terminals have in general been applied by the petitioners to freight from all territory in the United States lying north of the Ohio River and on and east of the Missouri, as alleged in said paragraph VIII and admits that it is necessary in order to afford to said interior territory a market on the Pacific coast for its merchandise, manufactures, and products, which there come into competition with merchandise, manufactures, and products from the Atlantic seaboard and contiguous territory for the petitioners to make as low rates from said interior territory to said Pacific coast terminals as the petitioners make to said terminals from the Atlantic seaboard and that lower rates should be made from said interior territory by reason of the conditions of said transportation and the economy of the shorter haul thereof.

IX.

Admits that the petitioners, at the time of the amendment of
407 the 4th section of the act to regulate commerce, had in effect, and now have in effect, rates from points on the Missouri River and in the vicinity thereof and from all other eastern defined territories to the Pacific coast terminals which are less than the rates from said Missouri River territory to points on their respective lines, like Spokane, Washington; Reno, Nevada; and Phoenix, Arizona; and that the difference between said rates is much greater than the several percentages from the different zones respectively, as alleged in paragraph IX of said petition; and denies that the rates that petitioners have made have been or are much less than reasonable rates, or much less than the value of the service rendered; and admits that there are some intermediate points to which higher than terminal rates have been made, which are situated on a single line of railway and where there are no competitive influences such as operate at the terminals, but says that there are many other intermediate points which are situated in thickly populated districts, and where there is a great density of traffic and that much higher than terminal rates are maintained by the petitioners at these points, as well as those last above mentioned; and denies every other allegation in said paragraph contained.

X.

Admits the allegations contained in paragraph X.

XI.

Admits the allegations contained in paragraph XI.

408 XII.

Admits the allegations contained in paragraph XII.

XIII.

Admits that by act of Congress approved June 18, 1910, the 4th section of the act to regulate commerce was amended, as alleged in paragraph XIII, and admits that the petitioners made applications to the Interstate Commerce Commission for leave to continue in effect said existing lower rates for the longer haul to the Pacific coast terminals, copies of said applications being attached as exhibits to said petition and made a part thereof; and denies every other allegation in said paragraph contained.

XIV.

Admits that said applications came on for hearing before said commission and that the petitioners submitted evidence in support

thereof, and that thereafter said commission made its reports and entered its order, a copy of said order being set forth in paragraph XIV; and denies each and every other allegation in said paragraph contained.

XV.

Denies each and every allegation in paragraph XV of the petition; and says that said amended 4th section is constitutional and does not purport to delegate legislative power to said commission.

409

XVI.

Denies each and every allegation in paragraph XVI of the petition.

XVII.

Denies each and every allegation in paragraph XVII of the petition.

XVIII.

Admits that the rates now charged by the petitioners on transcontinental traffic moving to Pacific coast terminals yield to the petitioners something in excess of the out-of-pocket expenses incident to the handling of the traffic moving under said rates and contributes something to the return which the petitioners are entitled to earn upon their properties, as alleged in paragraph XVIII contained; and denies every other allegation in paragraph XVIII contained.

XIX.

Denies each and every allegation in paragraph XIX of said petition.

XX.

Denies each and every allegation contained in paragraph XX of said petition; except that this intervener admits that the petitioners will be obliged to adjust many of their rates now in effect from Missouri River territory and all points east thereof in order to comply with the order of the commission.

410

XXI.

Denies each and every allegation contained in paragraph XXI of the petition.

XXII.

Admits that if not enjoined the orders made by the commission will on the 15th day of November, 1911, become effective and remain in force for two years thereafter, as alleged in paragraph XXII; and

that the petitioners will have to adjust their tariffs and make their charges in accordance with said order; and denies each and every other allegation contained in paragraph XXII of the petition.

All of which matters and things this intervener is ready to aver, maintain, and prove as this honorable court may direct, and prays that the petition herein may be dismissed and that this intervener may recover of and from said original petitioners its costs and charges herein.

CASSODAY, BUTLER, LAMB & FOSTER,
Attorneys for Intervener.

RUSH C. BUTLER,
WILLIAM E. LAMB,
STEPHEN A. FOSTER,
CORNELIUS LYNDE,
Of Counsel.

411 STATE OF ILLINOIS,
County of Cook, ss:

Stephen A. Foster, being first duly sworn, upon oath deposes and says that he is one of the attorneys of the above-named intervener and makes this verification for and on its behalf; that he has read the foregoing answer and knows the contents thereof; that the same is true as he verily believes.

STEPHEN A. FOSTER.

Subscribed and sworn to before me this 7th day of November, A. D. 1911.

[SEAL.] EDWIN J. NERGARD,
Notary Public.

412 *Order granting application for preliminary injunction and denying motions to dismiss.*

(Entered November 9, 1911.)

In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., petitioners,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } No. 50.

October term, 1911.

This cause coming on to be heard on motion for a preliminary injunction suspending the order of the Interstate Commerce Commission made July 31, 1911, passing upon applications numbers 205, 342, 343, 344, 349, 350, and 352, on behalf of the Transcontinental Freight Bureau for relief from the provisions of the fourth section

of the act to regulate commerce, as amended June 18, 1910, with respect to rates made from eastern points of shipment which are higher to intermediate points than to Pacific coast terminals, the said order being, as set forth in the petition herein, and the said motion having been argued by counsel, Charles Donnelly, F. C. Dillard, and Robert Dunlap, for the petitioners; Joseph N. Teal for the City of Portland, and other coast cities; P. J. Farrell, for the Interstate Commerce Commission; H. M. Stephens for City of Spokane and others, and Byron Waters for the Interior Counties Freight Bureau of Southern California, and others, intervening on that behalf; and J. A. Fowler, assistant to the Attorney General, for the United States; upon due consideration thereof, and of the bill, affidavits and answers, it is thereupon ordered and adjudged that a preliminary injunction issue as prayed for, and that the order of the said the Interstate Commerce Commission be suspended and enjoined until the further order of the court.

The motions to dismiss are denied.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

NOVEMBER 9, 1911.

413 *Opinion.*

(Filed November 14, 1911.)

United States Commerce Court.

Nos. 50 and 51.—October session, 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } No. 50.

UNION PACIFIC RAILROAD CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } No. 51.

INTERSTATE COMMERCE COMMISSION, CITY OF SPOKANE ET AL., CHICAGO Association of Commerce, Portland Chamber of Commerce et al., Interior Counties Freight Bureau of Southern California et al., Giroux Consolidated Mines Company, interveners.

ON MOTIONS FOR PRELIMINARY INJUNCTIONS AND ON MOTIONS TO DISMISS.

For opinions of Interstate Commerce Commission see 21 I. C. C. Rep., 329 and 400.

Mr. Charles Donnelly, Mr. F. C. Dillard, and Mr. Robert Dunlap, with whom Mr. T. J. Norton, Mr. E. C. Lindley, Mr. R. B.

414 Scott, Mr. Burton Hanson, Mr. James C. Jeffery, Mr. H. A. Scandrett, Mr. W. F. Herrin, and Mr. Gardiner Lathrop were on the brief, for the petitioners.

Mr. J. N. Teal for cities of Seattle, Tacoma, and Portland.

Mr. James A. Fowler, assistant to the Attorney General, and Mr. Blackburn Esterline, special assistant to the Attorney General, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. H. M. Stephens for City of Spokane et al.

Mr. Byron Waters for Interior Counties Freight Bureau of Southern California et al.

Before KNAPP, presiding judge, and ARCHBALD, HUNT, CARLAND, and MACK, judges.

[Nov. 14, 1911.]

MACK, Judge:

These cases involve the constitutionality and interpretation of section 4 of the act to regulate commerce of February 4, 1887, as amended June 18, 1910 (36 Stat., 539), and the powers of the Interstate Commerce Commission thereunder.

The sections as originally framed and as amended follow in parallel columns. The omissions from the original section and the additions in the amended section are italicized.

SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or
415 receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge *and* receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the commission *appointed under the provisions of this act*, such common carrier may, in special cases, after investigation *by the commission*, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section *of this act*.

SEC. 4. (*As amended June 18, 1910.*) That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line *or route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act;* but this shall not be construed as authorizing any common carrier within the terms of this act to charge *or* receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the *Interstate Commerce* Commission such common carrier may in special cases, after investigation, be authorized *by the commission* to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further, That no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required*

416 *to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission.*

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

At the time of the amendment a number of complaints of unreasonable and unjustly prejudicial rates filed by commercial bodies of the so-called intermountain cities, such as Spokane, Washington; Reno, Nevada; and Phoenix, Arizona, were pending before the commission. Similar complaints had been filed and partial adjustments thereof made at various times, beginning with the year 1892. Because of the amendment, the commission refrained from finally determining the commodity rates to which these cities were
417 entitled on west-bound traffic, believing that orders made under applications for relief, as provided in section 4, would obviate the necessity therefor.

Applications were duly filed in a form prescribed by the commission, which required carriers to state that the rate to the intermediate points should not be more than a certain number of cents per 100 pounds, per ton, per car, or per package, in excess of the rates to the farther point, in and by which applications the carriers asked to be allowed to maintain the Pacific coast terminal rates then in force, lower than the rates to intermediate points fixed by specified tariffs on file with the commission.

After a full hearing and investigation two reports and orders were made. Each report was entitled in the matter of the application under section 4. One of them was also entitled in the matter of the then pending Nevada and Arizona complaints (21 I. C. C. Rep., 329), although the order based thereon was entitled only in the matter of the applications under section 4; the other report was also entitled in the matter of the then pending Spokane and Salt Lake City complaints (21 I. C. C. Rep., 400), although the order based thereon was entitled only in the matter of the Spokane complaint.

The first order provided that for the purposes of the disposition of the applications the United States should be divided into five zones (being the same as those specified in a transcontinental tariff on file), as follows:

418 Zone No. 1 should comprise all that portion of the United States lying west of a line called line No. 1, which extends in a

general southerly direction from a point immediately east of Grand Portage, Minn.; thence southwesterly, along the northwestern shore of Lake Superior, to a point immediately east of Superior, Wis.; thence southerly, along the eastern boundary of Transcontinental Group F, to the intersection of the Arkansas and Oklahoma State line; thence along the west side of the Kansas City Southern Railway to the Gulf of Mexico.

Zone No. 2 should embrace all territory in the United States lying east of line No. 1 and west of a line called line No. 2, which begins at the international boundary between the United States and Canada, immediately west of Cockburn Island in Lake Huron; passes westerly through the Straits of Mackinac; southerly through Lake Michigan to its southern boundary; follows the west boundary of Transcontinental Group C to Paducah, Ky.; thence follows the east side of the Illinois Central Railroad to the southern boundary of Transcontinental Group C; thence follows the east boundary of Group C to the Gulf of Mexico.

Zone No. 3 should embrace all territory in the United States lying east of line No. 2 and north of the south boundary of Transcontinental Group C, and on and west of line No. 3, which is the Buffalo-Pittsburgh line from Buffalo, N. Y., to Wheeling, W. Va.,
419 marking the western boundary of Trunk Line Freight Association territory; thence follows the Ohio River to Huntington, W. Va.

Zone No. 4 should embrace all territory in the United States east of line No. 3 and north of the south boundary of Transcontinental Group C.

Zone No. 5 should embrace all territory south and east of Transcontinental Group C.

The order then proceeded as follows:

"It is further ordered, (1) That those portions of the above-numbered applications that request authority to maintain higher commodity rates from points in zone No. 1 to intermediate points than to Pacific coast terminals be, and the same are hereby, denied, effective November 15, 1911; (2) that petitioners herein be, and they are hereby, authorized to establish and maintain, effective November 15, 1911, commodity rates from all points in zones numbered 2, 3, and 4, as above defined, to points intermediate to Pacific coast terminals that are higher to intermediate points than to Pacific coast terminals; provided, that the rates to intermediate points from points in zones numbered 2, 3, and 4 shall not exceed the rates on the same commodities from the same points of origin to the Pacific coast terminals by more than 7 per cent from points in zone No. 2, 15 per cent from points in zone No. 3, and 25 per cent from points in zone No. 4.

The commission does not hereby approve any rates that may be established under this authority, all such rates being subject to complaint, investigation, and correction if they conflict with any other provisions of the act."

The second order is similar in all respects except that it refers only to Spokane and certain other intermountain cities, and ex-
420 pressly provides that the carriers shall comply therewith for a period of not less than two years.

The two suits brought in this court to enjoin the enforcement of these orders, respectively, were heard together. The same questions are presented in each of them.

First. We agree with the commission that section 4 of the act to regulate commerce as amended June 18, 1910, is constitutional. The commission concedes, and we concur therein, that if the first proviso in this section is to be literally construed, and if, under such construction, no limit has been imposed upon and no standard given to guide the exercise of the commission's discretion in granting authority to depart from the rule forbidding a lesser rate for the long than for the short haul in the same direction and over the same line or route, the proviso would be unconstitutional as an unlawful delegation of legislative power. We concur, too, in the commission's view that if the proviso were for this reason illegal the entire section would thereby be nullified, inasmuch as both the context and the history of the act demonstrate that the proviso is an integral part of the section, and that a hard and fast rule absolutely prohibiting such a lesser rate would not have been enacted.

To determine, however, the true meaning of the proviso, the entire act must be examined. In the light of the other sections, and of the legislative and judicial history of the long and short haul
421 clause, we are of the opinion that the guide to the exercise of the commission's discretion is to be found in the other sections of the act, thereby making the discretion to exempt carriers from the prohibition in fact not unlimited, and imposing upon the commission not merely the right but also the duty to grant such exemption whenever, on investigation, it shall find that no violation of any section of the act would thereby be involved.

If, therefore, the proposed rate, lower for the long than for the short haul, violates no provision of the act, and if, in particular, it neither tends to produce an unreasonable rate for the short haul nor operates unduly to prejudice the short-haul point and unduly to prefer the long-haul point, it is the duty of the commission to grant exemption from the hard and fast rule laid down in the first clause of section 4.

Second. The orders sought to be enjoined do not establish absolute rates for either the long or short haul or prescribe the extent, in dollars and cents, that the short-haul rate may exceed the present or some definitely fixed long-haul rate, but they do establish a relation between any long-haul rate that the carrier may put into effect and the short-haul rate, determining that from zone one the western short-haul rate shall not exceed the long-haul rate, and that from zones two, three, and four, the short-haul shall not exceed the long-haul rate by more than 7%, 15% and 25%, respectively.

The commission found specifically that the Pacific coast
422 rates from part of this eastern territory were forced by water competition, and that the rates from other parts were forced by market competition; for example, that the railroads based the New York-Seattle rate on the ocean competition and that they granted the same rate from St. Paul to Seattle in order to enable St. Paul to compete with New York in the Seattle market.

Under the fourth section as originally framed, it was decided (E. T., etc., Ry. Co. v. I. C. C., 181 U. S., 1, and cases cited therein) that carriers might, in the first instance and without application to the commission, make the rate less for the long than for the short haul, if, in fact, the circumstances and conditions were not substantially similar, taking their chances on a subsequent determination by a court that they had erred in so doing and had thereby violated the law. They could, however, and in many instances did, apply to the commission for the authority. After the section was construed as not requiring such an application in the first instance, the carriers, it was often charged, abused their privilege by making the rate for the long haul less than for the short haul, although the circumstances and conditions were substantially similar; this charge was, in any event, one of the causes that led to the amendment of the section whereby the clause "under substantially similar circumstances and conditions" was eliminated therefrom. The practical change thereby produced in section 4 was to compel the carriers to
423 make application to the commission if they desired to continue this practice.

The violation of the long and short haul rule is, however, only one instance—a most striking and irritating one, it is true—of the preference and prejudice which, when undue, is prohibited by section 3. Any violation of the original fourth section would necessarily involve a violation of the third section and, e converso, if the lesser rate for the long haul than for the short were not in violation of the third section it could not be in violation of the original fourth section. In E. T., etc., Ry. Co. v. I. C. C., supra, the court held that when it is established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and that the lesser rate for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates can not be held to be, in legal effect, the voluntary act of the carriers, and that therefore the provisions of the third section will not apply. The prohibition of the third section, it was said, is directed against undue preference arising from the voluntary and wrongful act of the carriers, and does not relate to acts the result of conditions wholly beyond the control of such carriers; the lesser rate for the long haul could not produce an unjust pref-
424 erence under the third section when the competitive conditions at the longer distance point which had caused the lesser

rate would produce the same preference, even though the carrier were forbidden to meet the competition. For example, as Seattle can get its supplies from New York by water, and Spokane, because of its location, can not do so, Seattle can not be said to be unduly favored merely because the rail carrier, in order to meet the water competition, charges a lesser rate from New York to Seattle through Spokane than from New York to Spokane, provided the Spokane rate is reasonable per se and the Seattle rate not unremunerative. And so, too, if the St. Paul-Seattle rate is reduced to a point less than reasonable per se although not unremunerative, to meet the New York-Seattle rate in order to enable the St. Paul merchants to compete with New York merchants at Seattle, Spokane could not complain merely because this rate is made less than the St. Paul-Spokane rate. In each of these cases Spokane is not unduly prejudiced, because if the lower rail rate to Seattle were forbidden Seattle would nevertheless, by reason of its location, be able to secure its supplies by water, and would therefore in the nature of things have this advantage over Spokane.

While the primary question in the E. T., etc., Ry. Co. case, supra, was as to the right of the carriers, in the first instance and without application to the commission, to make lesser rates for the
425 long than for the short haul, inasmuch as the original complaint charged a violation of both the third and the fourth sections, the court necessarily considered section 3, and held that it could not be violated by making a lesser charge for the long than for the short haul, if the long-haul rate was forced by competition and was not unremunerative.

This construction of section 3 was not dependent upon the clause in section 4 which, by the amendment of 1910, has been stricken out. It was based upon the language of section 3 itself, which forbade not any preference but only an undue preference, and upon the determination that, in the nature of things, there could be nothing undue in a preference which was caused by the natural geographical situation, and which would continue even if there were no railroad carriage. The amendment to section 4, therefore, has not changed the construction of section 3, and it follows that no unjust prejudice to Spokane and other interior points can now be predicated merely on the fact that the rate from any of the eastern territory is less to the Pacific coast terminals than to the intermediate points.

The commission also found, however, that the present Pacific coast rates from zone one had not been proven by the carriers, upon whom the burden was laid, to be less than reasonable per se. Assuming that they were fully reasonable per se, the commission would have the power to refuse exemption from the long and short haul
426 requirement, for under these circumstances any higher rates to intermediate points could be condemned as unreasonable and thus in violation of section 1 of the act.

But the order of the commission as to this territory is not limited to a denial of the applications in the form in which they were pre-

sented; that is, to a denial of the maintenance of the then prevailing rates to the coast concurrently with higher rates to the interior points. It forbids the carrier to maintain any coast rate lower than the contemporaneous intermediate rate from these points. In other words, if the carrier from St. Paul in order to meet new water competition from New York should reduce the St. Paul-Seattle rate to a point less than at present and less than a rate reasonable per se, but nevertheless somewhat remunerative, it would be compelled, under this order, to grant the same rate to the interior point, even though, under these circumstances, a reasonable rate to the interior point higher than the unreasonably low rate to the coast point forced upon the carrier by such market competition under penalty of losing the business would not be in violation of section 1 or of any other provision of the act.

This is likewise true of the order as to rates from the other zones. It is not based upon the current coast rates. It determines the relation of the short-haul rates to any coast rates that might be established by the carriers. It makes illegal a rate from Chicago to
427 Spokane more than 7 per cent higher than an unreasonably low but remunerative Chicago-Seattle rate forced by competition, even though the Chicago-Spokane rate be reasonable per se and not in violation of any provision of the act.

Is the commission empowered to make such an order? It is urged that even if it must grant an application for relief, when the lower long-haul rate involves no violation of the act, nevertheless it may determine the extent of the exemption and therefore it may fix the relation of rates.

But to sustain the constitutionality of the proviso in section 4 it must be read as imposing the duty on the commission not only to grant exemption from the hard and fast rule when thereby no section of the act is violated, but also to grant such exemption to the extent that no section of the act is thereby violated; that is, the carrier is entitled under the act to be granted authority to charge as much less as it please for the long haul than for the short haul, provided the commission shall first determine that it does not thereby violate any other provision of the law. In granting authority to make an absolute long-haul rate lower than some short-haul rate, the commission would have the power and the duty to prevent a violation of section 1 and, by virtue of its authority to determine reasonable rates, to fix the short-haul rate.

Doubtless the commission could, moreover, in order to prevent a violation of section 3, make relative rates in so far as this
428 might be necessary to prevent an undue preference. For while, under the decision in E. T., etc., Ry. Co. v. I. C. C., supra, undue preference could not be predicated merely on the fact that the rate was less for the long than for the short haul, when the former was forced by water, market, or any kind of competition, it might be predicated thereon if the short-haul rate were not likewise based upon the same competition in so far as and to the extent that

it ought fairly to be influenced thereby. For example, if the St. Paul-Seattle rate be made less than reasonable although remunerative to meet the forced New York-Seattle rate so as to enable St. Paul to compete with New York in the Seattle market, Spokane might complain of unreasonable prejudice against it if the St. Paul-Spokane rate were made higher than the New York-Spokane rate and thereby similar competition were prevented at Spokane. So too, as its merchants could get their supplies through Seattle at a price based on the New York-Seattle freight rate plus the back-haul rate, Spokane might have grounds for complaint of undue prejudice if the rate either from St. Paul or New York to Spokane were made higher than the rate from such point to Seattle plus the back haul, because only to the extent of the back-haul cost could Spokane be said to be in any different position than Seattle, and therefore only to that extent could it justly be deprived of the benefits of the same competitive forces which determine the Seattle rate.

429 But neither the equality of rates on shipments from zone 1 nor the relation between the rates on shipments from the other zones, as fixed in the order of the commission, can be sustained upon any such considerations. In so far as the commission attempts thus to determine the relation of the long-and-short-haul rates, irrespective of absolute rates, it goes beyond any authority that has been vested in it, for it is not in the power of the commission to say that 100 per cent, 107 per cent, or any given percentage of an unknown less than reasonable rate to the coast is necessarily a maximum reasonable and nondiscriminatory rate from the same point of origin to an interior point.

The practical effect of the commission's order is either to compel a blanket rate from the entire east to the entire west, or to prevent the carriers from getting all the business which they now secure without loss by making rates which enable merchants to meet market competition. For example, if the forced New York-Seattle rate is $1, the St. Paul-Seattle rate can not be made higher by the St. Paul carrier, unless it gives up the benefit of business which market competition at Seattle might bring to it. As long as it charges no one else an unreasonable rate, and as long as it does not carry under cost, it is entitled to grant St. Paul the market competitive rate of $1. Under the order, its rate to Spokane in that event could

430 not exceed $1, while the New York carrier could charge $1.25. The latter, however, would also have the right to enable New York to meet St. Paul competition in Spokane. To do this it would have to reduce the New York-Spokane rate to $1. The result would be either to compel a blanket rate from all points east of St. Paul to all competitive points west of St. Paul or to force the carriers to give up some business which could be carried without loss to themselves or damage to anyone else. The commission's order, more-

over, does not even secure to Spokane the market competition of St. Paul and New York, since it empowers the railroads to charge a higher rate from New York, which might exclude New York from the Spokane market.

In a word, unless some through business is given up, the effect of the orders would be to put Spokane and other interior points on an equality with Seattle and other Pacific coast points, at least from zone one—a position to which they would not be entitled under all circumstances in view of their relative locations, the former four hundred miles more or less in the interior, the latter on the coast.

It follows that the motions to dismiss the petitions must be denied and that writs to enjoin the enforcement of the orders, pending the final determination of the cases, must be issued. And it is so ordered.

ARCHBALD, Judge, concurring:

It is conceded that if the right to approve or disapprove of an application by a carrier to charge more for a shorter than for
431 a longer haul is left by the fourth section of the interstate commerce act, as it is at present amended, to the uncontrolled discretion of the commission, the section is invalid; also, that the proviso taken as it reads in terms confers such unlimited discretion; and that the section is only therefore to be saved in case a guide is found in other provisions of the statute.

"That section provides," says Mr. Commissioner Prouty, "that no carrier shall charge more for the short than for the long haul unless upon application to the commission permission to do so is granted by it. If this section were read by itself and were taken at its literal face meaning, the commission would possess unrestricted power to grant or deny such application. It could permit in one case and refuse in another, according as its fancy might dictate. So construed, the proviso would probably be void as a delegation of legislative authority. The making of rates is a legislative function. To say whether a carrier shall or shall not be allowed to charge more for the short than for the long haul is virtually the making of rates, and therefore an attribute of the legislature. To invest an administrative body like this commission with that unrestricted and unguided authority would be to give it legislative power, which can not be done under our Federal Constitution. It is one thing to authorize such a body to administer the law in accordance with certain rules and standards prescribed by the legislature and an entirely different thing to turn over to it the exercise of the legislative
432 discretion itself." Proceeding to consider whether the proviso could be separated from the rest of the section and the prohibitive part of it, where the charging of more for a shorter than for a longer haul over the same line in the same direction is forbidden, be sustained without regard to it, it was further held that the proviso was an essential part of the section which manifestly would not

have been enacted without it, and that the whole must therefore stand or fall together. This is a correct exposition of the law, and could not have been better stated than is done in the opinion of the commission. But I do not see how, in the face of it, to escape the conclusion that the section is invalid. It is sustained by the commission by importing into it the provisions of the first and third sections, which respectively prohibit unreasonable rates and unjust discriminations, where the requisite guide is found, as it is claimed, for the action of the commission. "Bearing in mind," says the same learned and able commissioner, "the authority which the commission now administers in prescribing a reasonable rate and in declaring and correcting an undue preference, it seems evident that the purpose of Congress was to commit to this body the duty of determining whether if the carrier was permitted to charge a higher rate at the intermediate point that would result in a violation of the provisions of the act. But in so doing the commission can not act arbitrarily.
It must investigate each case, and if after such investigation
433 it is of the opinion that a departure from the rule of the
fourth section would not result in unreasonable rates or undue discrimination it must permit that departure. If, upon the other hand, it is of the contrary opinion, it must refuse the permission. Such is the only possible construction which can be put upon this section in connection with the entire act, and if any doubt as to the real purpose of Congress could exist, it must be effectively put at rest by an examination of the history of the passage of this measure."

Undoubtedly the statute is to be taken as a whole and the different sections read together, but I fail to see how this helps out the matter. By the first section it is prescribed that all charges for any service rendered or to be rendered by carriers subject to the act in the transportation of passengers or property shall be just and reasonable, and every unjust and unreasonable charge is prohibited and declared unlawful. This does no more than enact the common into the Federal law, and neither adds to nor detracts from the rights of such carriers, except as it inferentially recognizes their right to a just and properly remunerative rate, in prohibiting an unjust and unreasonable one. But how does this assist the commission in any given case whether to enforce or relieve the carrier from the greater short than long haul charge prohibited by the first part of the section in question, or what direction or guide to that end does it afford? No
doubt it insures to the carrier that the short-haul charge shall
434 be reasonably remunerative where it has not been voluntarily
abandoned, although the commission in the order made has entirely disregarded this. But that is only half of the problem to be solved, if, indeed, it is that much. The point is that it affords no guide in determining when a disparity between the short and the long haul shall be permissible, which is the question which in each case is to be decided by the commission. But it is further said that at this juncture the third section comes in and authorizes a less

charge for a long than for a short haul, provided an undue or unreasonable preference or advantage does not result to any person or locality over any other. But this provision of the statute is not permissive, but prohibitive. It forbids in brief any undue discrimination, as the first forbids unjust or unreasonable rates, or the fourth the particular kind of discrimination against which it is leveled. It may be, correlatively or by inference, that a right to discriminate is recognized when it can be done without injustice or prejudice. But how again does this afford a guide to the commission in determining when a greater short than long haul charge shall be sanctioned? The fourth section in express terms declares that except as extenuated by the action of the commission a greater short than long haul charge is per se a discrimination and advantage which is unjust and undue, and not to be tolerated. And how is it possible, then, to say that a prohibition against what is undue furnishes a
435 guide or rule in determining when it shall result that that which so on its face is to be regarded as undue shall no longer be so? There shall be no undue discrimination, says the third section. A greater short than long haul charge is an undue discrimination, says the fourth. At what, then, do you arrive by combining the one with the other? Or where is here to be found the criterion or standard which is to enable the commission to say when and under what circumstances that which it is bound otherwise to say is an unjust and undue preference or advantage of one locality over another is not so? All the guide there is, is its say-so. But if it rests merely on that the enactment is confessedly void, and the action of the commission has nothing to sustain it. And that is the only conclusion which I can reach with regard to it. It is held good by the court for the reasons given by the commission, but to this I can not agree, and feel compelled in consequence to give expression to the views which I entertain to the contrary. There are at least such grave doubts with regard to the validity of the section that the question might well be passed by at this time, there being other grounds upon which the invalidity of the action of the commission may be rested.

For there can be no reasonable doubt that, assuming that the fourth section is valid, the orders of the commission go far beyond the power conferred by it. The authority given by the proviso is upon application of the carrier in special cases after investiga-
436 tion to permit the charging of less for longer than for shorter distances, the commission having the right from time to time to prescribe the extent to which the carrier may be relieved from the absolute prohibition against this, which is otherwise imposed upon it. There must thus in each instance be an application by a carrier, and a special case which entitles the carrier to relief—whatever that may mean—must be set up and made out. And this fixes the limits of the commission's authority. Its duty is to investigate what

is so brought before it, and, if a case warranting it appears, to approve the application; or if not, to refuse it. The commission can not go on, if it does not approve, and make rates, or lay down rules by which they shall be made, upon its own initiative. The carrier in making application for approval does not submit or subject itself to any such exaction. The right to inaugurate to this extent still remains with the carrier the same as before the amendment. The authority assumed by the commission here is not to be implied from the right to prescribe the extent to which from time to time the carrier may be relieved, in the words of the statute. This refers to the special case in each instance which the carrier is required to make out in order to get the approval of the commission, and is necessarily confined to it. In this respect the phraseology of the section is not changed, and it never by any previous construction was carried outside of this, nor is there anything now which requires it. It
437 may be that the applications made by the carriers here for the approval of existing long and short haul tariffs, blanketing the country, went beyond the statute. But if that was the case, the proper course to pursue was to throw them out upon that ground. The mere fact that they were in this form gave the commission no authority to go on and prescribe rates by the wholesale. The orders in controversy extend to the entire continent from east to west, saving only a comparatively small section in the southeast, which is reserved for subsequent consideration. This can not by the broadest construction of the law be brought within it. By no device can the whole United States be made a "special case"; nor can the commission, upon any just conception of its powers, lay down a hard and fast rule which shall apply to every long and short haul case wherever originating or whatever its destination from east to west across the country. Nor is this saved by the establishment of zones with varying percentages. As pointed out in the opinion of the court, this entirely disregards the right of the carriers to have considered what in each instance is a reasonable rate between points involved. It also overrides the established right of the carriers to make a less than reasonable rate to and from competitive points from whatever cause that competition arises. And it is an attempt to overcome the advantages possessed by coast over inland cities in the face of
438 what nature has provided. All this is fully discussed in the opinion of the court, in which I fully concur, and to which I can add nothing of consequence. For these reasons, without regard to any others, the orders of the commission were clearly invalid, and an injunction against them is properly to be granted, the motion to dismiss being necessarily overruled as the consequence. But I can not see my way to go beyond this and declare the fourth section valid, on which, if anything is to be said, my opinion is to the contrary.

439 *Assignment of errors.*

(Filed November 21, 1911.)

In the United States Commerce Court.

October term, 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND SIXTEEN other railroad companies, petitioners.
v.
THE UNITED STATES OF AMERICA, RESPONDENT, AND NINE INTERVENERS. } No. 50.

ASSIGMENT OF ERRORS.

Come now the United States of America, respondent: Interstate Commerce Commission; Chicago Association of Commerce; City of Spokane, Washington, and County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; Spokane Jobbers' Association of Spokane, Washington; Interior Counties Freight Bureau of Southern California; Maricopa County Commercial Club, of Phoenix, Arizona; and Giroux Consolidated Mines Company, by their respective counsel, and in connection with their application for appeal, file the following assignment of errors on which they will rely upon said appeal to the Supreme Court of the United States from the interlocutory order or decree of the Commerce Court entered November 9, 1911, in the above-entitled cause.

The Commerce Court erred:

I.

In granting the preliminary injunction enjoining the order of the Interstate Commerce Commission, entered July 31, 1911, passing upon applications Nos. 205, 342, 343, 344, 349, 350, and 352, on
440 behalf of the Transcontinental Freight Bureau for relief from the provisions of the fourth section of the act to regulate commerce, as amended June 18, 1910, and suspending the force and effect of the same, for that the petition of the petitioners and the affidavits in support of the same, (a) do not set forth any cause of action and are insufficient to warrant the granting of the preliminary injunction or to form the basis for any relief from the said order; (b) nor have the said petitioners shown that there is any equity in the said petition upon which to grant the preliminary injunction or to form the basis for any relief from the said order; (c) nor have the petitioners shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce; (d) nor have the petitioners shown that in making

its said order the Interstate Commerce Commission violated any right of the said petitioners protected by the Constitution of the United States or any other right of the said petitioners over which this court may exercise jurisdiction.

II.

In holding that the action of the Interstate Commerce Commission had and taken July 31, 1911, in passing upon applications numbers 205, 342, 343, 344, 349, 350, and 352, on behalf of the Transcontinental Freight Bureau for relief from the provisions of said section 4, is an order of the Interstate Commerce Commission within the meaning of section 1 of an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, which provides that the Commerce Court shall have jurisdiction in all cases "brought
441 to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

III.

In holding that section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," approved June 18, 1910, when properly construed, does not authorize the division of the United States into the five zones prescribed and adopted by the Interstate Commerce Commission as a basis upon which to make and prescribe rates, fares, and charges of common carriers under said section 4 and that the same was beyond the power of the Interstate Commerce Commission.

IV.

In holding that said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed does not authorize the percentage bases prescribed and adopted by the Interstate Commerce Commission for the purpose of making and prescribing the rates, fares, and charges of common carriers under said section 4 and that the same was beyond the power of the Interstate Commerce Commission.

442 V.

In holding that said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed does not authorize the division of the United States into the five zones prescribed and adopted by the Interstate Commerce Commission and the percentage bases prescribed and adopted by the Interstate Commerce Commission, and the making of rates, fares, and charges from the

said zones on the said percentage bases and that in adopting such a method of making and prescribing rates, fares, and charges of common carriers under said section 4, the Interstate Commerce Commission acted beyond its power and authority.

VI.

In holding that if the said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed, authorizes the percentage bases prescribed and adopted by the Interstate Commerce Commission for the purpose of making rates, fares, and charges of common carriers under said section 4, that the said section 4, as so construed, is beyond the power of Congress to enact and is unconstitutional and void.

VII.

In holding that if the said section 4 of the act of Con-
443 gress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed, authorizes the Interstate Commerce Commission to divide the United States into the five zones prescribed and adopted by the said commission and to make rates, fares, and charges from the said five zones on the percentage bases adopted by the Interstate Commerce Commission, that said section 4, as so construed, is beyond the power of Congress to enact and is unconstitutional and void.

VIII.

In granting the preliminary injunction enjoining the said order of the Interstate Commerce Commission entered July 31, 1911, and suspending the force and effect of the same, for that the Interstate Commerce Commission in making and entering the said order did proceed in all respects in accordance with the statute in such case made and provided and after a full hearing, and that in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion together with its decision, order, or requirement in the premises, and by virtue of its authority in that behalf, it prescribed the extent to which the petitioners may be relieved from the operation of said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910; all of which were matters and things within the power of the said Interstate Commerce Commission to hear and determine, and its report and order are conclusive upon the court and the matters and things alleged in the petition and the affidavits in support of the same are insufficient to disturb the said order.

444

IX.

In granting the preliminary injunction, for that even though the said order of July 31, 1911, is null and void as beyond the power and authority of the Interstate Commerce Commission, nevertheless, in granting the preliminary injunction, in the manner and form in which the same was granted, the Commerce Court suspended and annulled the provisions of said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, and continued in force and effect the rates, fares, and charges then existing, whereas when the said order of July 31, 1911, was entered the applications filed before the commission had been determined within the meaning of the second proviso of said section 4, and either said order thereupon became effective or the requirement of the statute that petitioners shall not charge more for a shorter than for a longer haul became absolute, and said statutory requirement is not subject to the injunctive power of the court.

X.

In denying the separate motions of the United States and the Interstate Commerce Commission to dismiss the petition:

445 Wherefore the United States and the said interveners pray that the said interlocutory order or decree of the Commerce Court, entered November 9, 1911, be reversed, annulled, and set aside, and that the petition be dismissed, and for such other and further order as may be appropriate.

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P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

CASSODAY, BUTLER, LAMB & FOSTER,
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J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors for City of Spokane, Washington, for County of Spokane, Washington, for Chamber of Commerce of Spokane, Washington, and for Spokane Jobbers' Association of Spokane, Washington.

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Solicitor for Interior Counties Freight Bureau of Southern California and for Maricopa County Commercial Club of Phoenix, Arizona.

WILLIAM A. GLASGOW, JR.,
Solicitor for Giroux Consolidated Mines Company.

446 *Petition for appeal.*

(Filed November 21, 1911.)

In the United States Commerce Court.

October term, 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND SIXTEEN other railroad companies, petitioners.
v.
THE UNITED STATES OF AMERICA, AND NINE INTERVENERS, RESPONDENT. } No. 50.

PETITION FOR APPEAL.

The United States of America, respondent; Interstate Commerce Commission; Chicago Association of Commerce, a corporation; city of Spokane, Washington, and County of Spokane, Washington, municipal corporations; Chamber of Commerce of Spokane, Washington, a corporation; Spokane Jobbers' Association of Spokane, Washington, an association; Interior Counties Freight Bureau of Southern California, an association; Maricopa County Commercial Club of Phoenix, Arizona, an association, and Giroux Consolidated Mines Company, a corporation, interveners, feeling themselves aggrieved by the interlocutory order or decree of the Commerce Court, entered November 9, 1911, granting a preliminary injunction suspending and enjoining the order of the Interstate Commerce Commission until the further order of the court, by their respective counsel, pray an appeal to the Supreme Court of the United States, in accordance with section 2 of an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910.

The particulars wherein the United States and the said interveners consider said order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

And the United States and the said interveners further pray that a transcript of the record, proceedings, and papers on which the said order or decree was made and entered, duly authenticated,

447 may be transmitted forthwith to the Supreme Court of the United States.

GEO. W. WICKERSHAM,
Attorney General of the United States.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

CASSODAY, BUTLER, LAMB & FOSTER,
Solicitors for Chicago Association of Commerce.

A. M. CRAVEN,
JOHN WILEY,
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors for city of Spokane, Washington; for County of Spokane, Washington; for Chamber of Commerce of Spokane, Washington; and for Spokane Jobbers' Association of Spokane, Washington.

BYRON WATERS,
Solicitor for Interior Counties Freight Bureau of Southern California and for Maricopa County Commercial Club of Phoenix, Arizona.

WILLIAM A. GLASGOW, Jr.,
Solicitor for Giroux Consolidated Mines Company.

Allowed:

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court in said cause.

448 *Order allowing appeal.*

(Entered November 21, 1911.)

In the United States Commerce Court.

October term, 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND sixteen other railroad companies, petitioners, v. THE UNITED STATES OF AMERICA AND NINE INTERVENERS, respondent.	No 50.

ORDER ALLOWING APPEAL.

In the above entitled cause, the United States of America; the Interstate Commerce Commission; Chicago Association of Commerce; city of Spokane, Washington, and county of Spokane, Washington; Chamber of Commerce of Spokane, Washington; Spokane

Jobbers' Association, of Spokane, Washington; Interior Counties Freight Bureau of Southern California; Maricopa County Commercial Club, of Phoenix, Arizona; and Giroux Consolidated Mines Company having made and filed their petition praying an appeal to the Supreme Court of the United States from the interlocutory order or decree of the Commerce Court, entered November 9, 1911, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided—

It is ordered and decreed that the said appeal be and the same is hereby allowed as prayed and made returnable on the 21st day of December, A. D. 1911; and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, papers, and proceedings to the Supreme Court of the United States.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court in said Cause.

449 *Docket entries.*

United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., petitioners,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION et al., interveners.
} No. 50.

Attorneys: Robert Dunlap, T. J. Norton, N. H. Loomis, H. A. Scandrett, F. C. Dillard, P. L. Williams, W. W. Cotton, C. W. Durbrow, C. W. Bunn, Chas. Donnelly, R. A. Jackson, E. C. Lindley, C. M. Dawes, R. B. Scott, E. M. Hyzer, C. C. Wright, Burton Hanson, James C. Jeffery, M. L. Clardy, F. W. M. Cutcheon, A. S. Halsted, A. H. Bright, for petitioners; James A. Fowler, Blackburn Esterline, for United States; P. J. Farrell, for Interstate Commerce Commission; J. B. Campbell, H. M. Stephens, Rush C. Butler, Wm. E. Lamb, Stephen A. Foster, Cornelius Lynde, Byron Waters, Wm. A. Glasgow, jr., for interveners.

PROCEEDINGS.

1911.
Oct. 4. Petition filed.
Oct. 4. Affidavits of J. C. Stubbs, H. E. D. Jackson, James G. Woodworth, G. W. Luce, F. H. Plaisted, J. A. Munroe, and Frederick H. Parker filed.
Oct. 4. Motion for restraining order filed.
Oct. 4. Acceptance on behalf of U. S. and I. C. C. of service of notice of hearing on application for temporary injunction filed.
Oct. 5. Copy of petition filed with chairman of I. C. C. and in Department of Justice.
Oct. 7. Appearance of I. C. C. as party respondent and P. J. Farrell as solicitor filed.

Oct. 14. Affidavit of E. B. Boyd filed.
Oct. 14. Motion of Interstate Commerce Commission to dismiss filed.
Oct. 16. Intervention petition of City of Spokane et al. filed.
Oct. 16. Affidavits of E. P. Ripley and James Peabody filed.
Oct. 17. Petition of intervention of Chicago Association of Commerce filed.
Oct. 18. Brief for petitioners on application for temporary injunction filed.
Oct. 18. Order entered granting City of Spokane et al. leave to intervene.
Oct. 18. Answer of interveners, City of Spokane et al., filed.
Oct. 18. Affidavit of H. M. Stephens filed.
Oct. 19. Petition of intervention of Interior Counties Freight Bureau of Southern California et al. filed.
450 Oct. 19. Supplemental brief on behalf of D. & R. G. R. R. Co. and Western Pacific Ry. Co. filed.
Oct. 19. Affidavits of F. M. Dewees filed.
Oct. 20. Order entered granting leave to Interior Counties Freight Bureau of Southern California and Maricopa County Commercial Club of Phoenix, Ariz., to intervene.
Oct. 20. Affidavit of Byron Waters filed.
Oct. 20. Order entered granting Chicago Association of Commerce leave to intervene.
Oct. 20. Affidavits of C. J. McNitt and R. Blaisdell filed.
Oct. 23. Affidavit of A. D. McDonald filed.
Oct. 24. Motion of the United States to dismiss filed.
Oct. 25. Petition of intervention of Giroux Consolidated Mines Co. filed.
Oct. 25. Order entered granting Giroux Consolidated Mines Co. leave to intervene.
Oct. 26. Letter from William Ellis requesting withdrawal of name as attorney filed.
Nov. 9. Answer of intervener, Chicago Association of Commerce, filed.
Nov. 9. Order entered granting application for preliminary injunction and denying motions to dismiss.
Nov. 14. Opinion filed.
Nov. 21. Motion for final decree filed.
Nov. 21. Order assigning case for hearing on motion for final decree filed.
Nov. 21. Assignment of errors filed.
Nov. 21. Petition for appeal filed.
Nov. 21. Order allowing appeal filed.
Nov. 27. Citation on appeal filed.

451 In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., petitioners,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE Commerce Commission et al., interveners.
} No. 50.

UNITED STATES OF AMERICA, *ss:*

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 450, inclusive) to be a true and complete transcript of the proceedings had of record in the above entitled cause, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 2d day of December, A. D. 1911.

[SEAL.] G. F. SNYDER, *Clerk.*

452 *Citation on appeal.*

UNITED STATES OF AMERICA, *ss:*

To Atchison, Topeka & Santa Fe Railway Company; Union Pacific Railroad Company; Oregon Short Line Railroad Company; Oregon-Washington Railroad & Navigation Company; Southern Pacific Company; Northern Pacific Railway Company; Great Northern Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & North Western Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Puget Sound Railway Company; Denver & Rio Grande Railroad Company; Missouri Pacific Railway Company; Western Pacific Railway Company; San Pedro, Los Angeles & Salt Lake Railroad Company; Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof pursuant to an appeal duly allowed and filed in the clerk's office of the United States Commerce Court wherein the United States of America; Interstate Commerce Commission; Chicago Association of Commerce, a corporation; City of Spokane, Washington, and County of Spokane, Washington, municipal corporations; Chamber of Commerce of Spokane, Washington, a corporation; Spokane Jobbers' Association of Spokane, Washington, an association; Interior Counties Freight Bureau of Southern California, an association; Maricopa County Commercial Club of Phoenix, Arizona, an association; and Giroux Consolidated Mines Company, a corporation, are appellants, and you are appellees, to show cause, if any there be, why the interlocutory order or decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Martin A. Knapp, presiding judge
453 of the United States Commerce Court, this twenty-first day of November, in the year of our Lord nineteen hundred and eleven.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court.

Service of a copy of the within citation is hereby admitted this 25th day of Nov., A. D. 1911.

ROBERT DUNLAP,
F. C. DILLARD,
CHAS. DONNELLY,
Solicitors for all Appellees.

(Filed. United States Commerce Court. Nov. 27, 1911. G. F. Snyder, clerk.)

Indorsement on cover: File No. 22959. United States Commerce Court. Term No. 883. The United States of America, Interstate Commerce Commission et al., appellants, vs. Atchison, Topeka & Santa Fe Railway Company et al. Filed December 8th, 1911. File No. 22959.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible] 137

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS,

vs.

UNION PACIFIC RAILROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

FILED DECEMBER 8, 1911.

(22960)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 884.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS,

vs.

UNION PACIFIC RAILROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

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a United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY; OREGON-WASHINGTON Railroad & Navigation Company; Oregon Short Line Railroad Company; Northern Pacific Railway Company; Great Northern Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & North Western Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Puget Sound Railway Company; Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company, petitioners.	No. 51.
vs.	
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION; City of Spokane et al.; Chicago Association of Commerce; Portland Chamber of Commerce et al.; Giroux Consolidated Mines Company, interveners.	

UNITED STATES OF AMERICA, *ss:*

Be it remembered, that in the United States Commerce Court, in the city of Washington, District of Columbia, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

Petition
filed October 4, 1911
No 51.

IN THE

United States Commerce Court.

Union Pacific Railroad Company, Oregon-Washington Railroad & Navigation Company, Oregon Short Line Railroad Company, Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago & Northwestern Railway Company, Chicago, Milwaukee & St. Paul Railway Company, Chicago, Milwaukee & Puget Sound Railway Company, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company,

Petitioners,

vs.

United States of America,

Respondent.

PETITION.

To the Honorable the Judges of the United States Commerce Court.

Union Pacific Railroad Company, a corporation organized under the laws of the State of Utah; the Oregon Short Line Railroad Company, a corporation organized under the laws of the State of Utah; the Oregon-Washington Railroad & Navigation Company, a corporation organized under the laws of the State of Oregon; the Northern Pacific Railway Com-

pany, a corporation organized under the laws of the State of Wisconsin; the Great Northern Railway Company, a corporation organized under the laws of the State of Minnesota; the Chicago, Burlington & Quincy Railroad Company, a corporation organized under the laws of the State of Illinois; the Chicago & North-Western Railway Company, a corporation organized under the laws of the State of Illinois; the Chicago, Milwaukee & St. Paul Railway Company, a corporation organized under the laws of the State of Wisconsin; the Chicago, Milwaukee & Puget Sound Railway Company, a corporation organized under the laws of the State of Washington; The Canadian Pacific Railway Company, a corporation organized under the laws of the Dominion of Canada; the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation organized under the laws of the States of Wisconsin and Minnesota, on their own behalf, as well as on behalf of all other common carriers affected by the order hereinafter referred to, bring this, their petition, against the United States of America, and thereupon complain and say:

I.

The Union Pacific Railroad Company owns and operates lines of railway extending from Council Bluffs in the State of Iowa and Kansas City in the State of Missouri westwardly through the States of Nebraska, Kansas, Colorado to Granger in the State of Wyoming and thence to Ogden in the State of Utah. The Oregon Short Line Railroad Company owns and operates lines of railway extending from Granger in the State of Wyoming and Salt Lake City in the State of Utah westwardly and northerly through the States of Wyoming, Idaho and Utah to Huntington in the State of Oregon. The Oregon-Washington Railroad & Navigation Company owns and

operates a line of railway extending from Huntington in the State of Oregon westwardly and northerly through Baker City and La Grande in the said State of Oregon to Portland in said State and Tacoma and Seattle in the State of Washington, with a branch extending northerly from Pendleton in the State of Oregon through Walla Walla in the State of Washington to the City of Spokane in said last named State. The Northern Pacific Railway Company owns and operates lines of railway extending from St. Paul in the State of Minnesota and Ashland in the State of Wisconsin westwardly through the States of Minnesota, North Dakota, Montana, Idaho and Washington, through Spokane to Tacoma and Seattle in said last named state and Portland in the State of Oregon, with a branch extending from Pasco in the State of Washington to Walla Walla in said state and Pendleton in the State of Oregon. The Great Northern Railway Company owns and operates a line of railway extending from St. Paul and Duluth in the State of Minnesota westwardly through said state and the States of North Dakota, Montana, Idaho and Washington through Spokane to Tacoma and Seattle in said last named state and Portland in the State of Oregon. The Chicago, Burlington & Quincy Railroad Company owns and operates lines of railway extending from Chicago in the State of Illinois, from St. Louis in the State of Missouri, westwardly and northerly through the States of Iowa, Nebraska, Kansas, Colorado, Wyoming, South Dakota and Montana to Billings in said last named state. The Chicago & North-Western Railway Company owns and operates a line of railway extending from Chicago in the State of Illinois and through the States of Illinois and Iowa to Council Bluffs, where it connects with the line of the Union Pacific Railroad Company, and through the States of Wisconsin, Minnesota, Nebraska, South Dakota and Wyom-

ing to the town of Lander in said last mentioned state. The Chicago, Milwaukee & St. Paul Railway Company owns and operates a line of railway extending from Chicago in the State of Illinois westwardly and northwestwardly through the States of Illinois, Wisconsin, Minnesota, Iowa, Missouri and South Dakota to Mobridge in said last mentioned state. The Chicago, Milwaukee & Puget Sound Railway Company owns and operates a line of railway extending from Mobridge in the State of South Dakota westwardly through said state and the States of North Dakota, Montana, Idaho and Washington to the Cities of Tacoma and Seattle on Puget Sound in said last mentioned state. The Canadian Pacific Railway Company owns and operates a line of railway extending from the Atlantic to the Pacific Ocean in the Dominion of Canada and connecting with various lines in the United States. The Minneapolis, St. Paul and Sault Ste. Marie Railway Company owns and operates a line of railway extending from Chicago in the State of Illinois and Sault Ste. Marie in the State of Michigan westwardly and northerly through the States of Wisconsin, Michigan, Minnesota and North Dakota to Portal in the Dominion of Canada. Each and all of said railways have numerous branches extending into and through said states and other states and have a great number of junction points where there is interchange of traffic between them.

II.

The lines of the Oregon-Washington Railroad & Navigation Company, Northern Pacific Railway Company, Great Northern Railway Company and Chicago, Milwaukee & Puget Sound Railway Company extend to the Pacific Coast and are delivering lines by and over which freight is transported to points in the States of Oregon and Washington on said coast, and

the lines of said last named companies, in connection with certain lines of certain other petitioners herein, form lines and through routes for the transportation of passengers and freight to said coast, as well as to said Cities of Spokane, Walla Walla, Pendleton, La Grande and Baker City and territory adjacent to said cities and in connection with the Lake Shore & Michigan Southern Railway Company, New York Central & Hudson River Railroad Company, Pittsburg, Fort Wayne & Chicago Railway Company, Pennsylvania Railroad Company, New York, New Haven & Hartford Railroad Company and Boston & Maine Railroad Company, as well as with the lines of various other railroad companies, form through trans-continental routes for the transportation of freight and passengers from points on the Atlantic Seaboard and territory west thereof to said cities and to points in Oregon and Washington on said Pacific Coast.

III.

The respective lines of petitioners connect at many points directly and indirectly with a vast number of other different lines extending to the Gulf of Mexico and the Atlantic Seaboard and to various points in the middle and eastern part of the United States, forming a vast number of different lines and routes controlled by different railroad companies and all competing with each other, as well as with water and foreign carriers, for business to and from the Pacific Coast. All of your petitioners are common carriers by rail and are now and have been for many years engaged in the transportation of passengers and freight over their respective lines of railroad and all of them are subject to the Act to Regulate Commerce and the acts amendatory thereof.

IV.

In the transportation of freight in the territories served by your petitioners and in fixing the rates or tariffs for the transportation thereof it has been found necessary to classify the freight thus transported, and for many years the freight carried over the lines of your petitioners has been divided or grouped in ten classes, known as Classes 1, 2, 3, 4, 5, A, B, C, D and E. Said ten classes include practically all of the freight moved over the lines of your petitioners except such bulky articles as lumber, coal and grain moving in carloads and taking specific rates. The rates charged for moving the freight falling within each class bear and have at all times borne a given relation to each other and at the time of the commencement before the Interstate Commerce Commission of the proceedings hereinafter referred to the class rates to terminals on the Pacific Coast and to points like Spokane, Walla Walla and adjacent territory for the movement of freight falling within said classes respectively were as follows:

TO SEATTLE, WASH.

FROM—	1	2	3	4	5	A	B	C	D	E	
St. Paul, Minn	.....	300	260	220	190	160	160	125	100	95	85
Chicago, Ill	.....	300	260	220	190	165	160	125	100	100	95
New York, N. Y	....	300	260	220	190	165	160	125	100	100	95

TO SPOKANE, WASH.[a]

From—	1	2	3	4	5	A	B	C	D	E
St. Paul, Minn	300	260	220	190	150	145	125	100	95	85
Chicago, Ill	360	310	260	210	170	170	145	117	109	98

TO MISSOULA, MONT.*a*

From—	1	2	3	4	5	A	B	C	D	E
St. Paul, Minn.	236	201	165	142	118	118	94	83	59	47
Chicago, Ill.	296	251	205	167	138	143	114	100	73	60
					1	2	3	4	5	6
New York to Chicago					75	65	50	35	30	25

a Rates from New York to Spokane and Missoula are made on combination over Chicago.

V.

From the time of the construction of their respective lines of railway your petitioners in transporting freight to terminals on the Pacific Coast and to points in the immediate vicinity thereof have transported the same in competition with carriers by water, said water carriers moving such freight from the Atlantic Seaboard in vessels and steamships either directly by water around Cape Horn or through the Straits of Magellan to said Pacific Coast terminals or by water to points on the Atlantic Coast on the Isthmuses of Tehuantepec and Panama, whence said freight is transported by rail to the Pacific Coast over said isthmuses, moving thence in sailing vessels or steamships to said Pacific Coast terminals of your petitioners. The expense incident to the carriage of freight by water in the manner described is now and has heretofore been so low that such water carriers have at all times been able to make and have made and are now making very low rates for the carriage thereof to said Pacific Coast terminal points, and your petitioners in competing with said water carriers for freight moving from the Atlantic to the Pacific Coast have been compelled to lift out of their respective classes and to make specific rates on the great bulk of commodities moving to Pacific Coast terminals, which specific rates so made have been only slightly in excess of the rates

charged by the water carriers, the quicker service by your petitioners and the absence of any charge for marine insurance on freight carried over their lines allowing of their maintaining this slight excess. In consequence of the necessity of thus making exceptions to said class rates to the coast, in order to meet the competition thus encountered, nearly all of the tonnage moving to the Pacific Coast has for years moved and is now moving under specific commodity rates so made to meet said exceptional conditions, but as these exceptional conditions were encountered in the full extent only at the Pacific Coast terminal points and were felt only in a gradually diminishing degree as the distance from the Pacific Coast eastwardly into the interior increased, the practice of departing from the said class rates or of lifting specific commodities out of their respective classes and affixing to each a specific rate lower than the class rate for the movement thereof has obtained much less at Spokane, Walla Walla and other interior points than at the coast terminals.

VI.

Traffic moves in large volume over the ocean to the Pacific Coast ports of the United States from the Orient and from the Continent of Europe, and also moves in like volume from the Orient and from the Continent of Europe to Canadian ports on the Pacific Coast and thence by vessel to the Pacific Coast ports of the United States. This traffic embraces substantially all kinds of goods manufactured or produced in the United States and carried by rail to the Pacific Coast terminals. By reason of the less cost of the transportation of freight by water than by rail it is carried at rates exceedingly low and in order to compete with the ocean carriers, the rail carriers reaching Pacific Coast terminals are forced to make

exceedingly low rates on like traffic for the movement thereof. By reason of the competitive forces aforesaid the said Pacific Coast ports became and are markets and distributing centers for all products brought thereto.

VII.

At said Pacific Coast terminals the lines of the Oregon-Washington Railroad & Navigation Company, Northern Pacific Railway Company, Great Northern Railway Company and the Chicago, Milwaukee & Puget Sound Railway Company converge, and in consequence there has been and is active competition between the lines of your petitioners for transcontinental business moving to said terminals, and each of your petitioners has been compelled, in consequence of said competition as well as of the competition of water carriers and of foreign markets, hereinabove referred to, to make to said terminals less than reasonable rates for the transportation of traffic thereto.

VIII.

The rates which the competitive influences, above described, have thus compelled your petitioners to make from the Atlantic Seaboard to said Pacific Coast terminals have in general been applied by your petitioners from all territory in the United States lying north of the Ohio and on and east of the Missouri River, embracing the territories described as Zones 2, 3 and 4 and a considerable part of the territory described as Zone 1 in the order of the Interstate Commerce Commission, hereinafter referred to, so that a given commodity moving from New York, Pittsburg, Chicago, St. Paul, Kansas City or Omaha to Seattle, Tacoma or Portland moves upon the

same rate. The products of said interior territory lying north of the Ohio River and on and east of the Missouri River compete at said Pacific Coast terminals with products of the Atlantic Seaboard and said interior territory manufactures or produces substantially all of the commodities manufactured or produced upon the Atlantic Seaboard, and in order to enable your petitioners to compete in carrying these manufactures and products with carriers carrying like manufactures and products from the Atlantic Seaboard and contiguous territory and in order to afford said territory a market on the Pacific Coast for its products it has been necessary for your petitioners to make therefrom rates to said terminals upon the commodities moving therefrom as low as the rates made to said terminals over the lines of your petitioners and others from the Atlantic Seaboard.

IX.

Because of the competitive conditions, above referred to and described, your petitioners have been compelled, as heretofore stated, to make, and at the time of the amendment of the fourth section of the Act to Regulate Commerce had in effect and now have in effect, rates to the Pacific Coast terminals from that portion of Zone 1, described in the Commission's order hereinafter referred to, lying in the vicinity of and east of the Missouri River, to the same territory, which are much less than the rates from said zone to interior points on their respective lines, like Spokane, Walla Walla, Baker City, La Grande and Pendleton, and which are less by much more than seven per cent. than the rates in effect from Zone 2, as described in said order, to said interior points, and which are less by much more than fifteen per cent. than the rates in effect from points in Zone 3, as de

scribed in said order, to said interior points, and which are less by much more than twenty-five per cent. than the rates in effect from points in Zone 4, as described in said order, to said interior points. The rates which your petitioners have been compelled to so make to their Pacific Coast terminals, both class and commodity, have been and are much less than reasonable rates and much less than the value of the service rendered in transportation of the freight carried thereunder to such terminals and are in no sense a measure or measures of what may lawfully be charged by your petitioners for the carriage of such freight to points on their respective lines, such as Spokane, Walla Walla, Baker City, La Grande and Pendleton and other interior points, where the influence of the competitive conditions above described in many instances is felt in greatly diminished degree and in many not at all. Many of the interior points to which rates higher than the terminal rates have been made are situated in desert country, sparsely settled, where there is little density of traffic, many of them on a single line of railway and where the competitive influences operating at the terminals are entirely wanting.

X.

On or about September, 1906, the City of Spokane and others began before the Interstate Commerce Commission a proceeding against the Northern Pacific Railway Company and certain others of your petitioners, appearing as No. 879 on the docket of the Commission, by which they complained of rates from Missouri River territory, Mississippi River territory and Chicago territory (meaning three separate rate territories where the rates to Spokane from points of origin in each said respective territory were the same) and also the rates from Atlantic Seaboard territory to the City of Spokane,

charging that said rates were unjust, unreasonable and discriminatory and seeking the reduction of said rates, praying that the same be made reasonable and that no rate from any eastern territory should be made higher to the City of Spokane than to the Pacific Coast cities. Thereafter, by order of the Interstate Commerce Commission, all of your petitioners, except the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, Milwaukee & Puget Sound Railway Company, were made defendants and there were also made defendants certain other railway companies against whom the order hereinafter referred to runs. On or about the 9th day of February, 1909, the Commission made its certain report and issued its certain order, effective May 1, 1909, said order being as follows:

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its Office in Washington, D. C., on the 9th day of February, A. D. 1909.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 879.

City of Spokane, Wash.; Chamber of Commerce of Spokane, Wash.; County of Spokane, Wash., and Spokane Jobbers' Association of Spokane, Wash.,

vs.

Northern Pacific Railway Company; Great Northern Railway Company; Union Pacific Railroad Company; Oregon Rail-

road & Navigation Company; Oregon Short Line Railroad Company; Canadian Pacific Railway Company; Chicago, Burlington & Quincy Railway Company; Chicago & Northwestern Railway Company; Lake Shore & Michigan Southern Railway Company; New York Central & Hudson River Railroad Company; Pittsburg, Fort Wayne & Chicago Railway Company; Pennsylvania Railroad Company; New York, New Haven & Hartford Railroad Company; Boston & Maine Railroad, and Spokane Falls & Northern Railway Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission being of the opinion that the class rates now maintained by the defendants from St. Paul, in the state of Minnesota, and Chicago, in the state of Illinois, to Spokane, in the state of Washington, are unjust and unreasonable, and that the rates now applied by said defendants to the transportation of the commodities hereinafter named, in carloads, from St. Paul, Minn., and Chicago, Ill., to Spokane, Wash., are unjust and unreasonable, and being further of the opinion that the class rates named in the third paragraph of this order would be just and reasonable class rates to apply between said points for the future, and that the commodity rates stated in the fourth paragraph of this order would be just and reasonable rates to apply to the transportation of said commodities, in carloads, between said points, and having on the date hereof made and filed a report containing its conclusions thereon:

It is ordered, That the said defendants be, and they are hereby, severally notified and required to cease and desist on or before the 1st day of May, 1909, and for the period of two years thereafter to abstain from charging, demanding, collecting, or receiving, for the transportation of property from St.

Paul, aforesaid, and Chicago, aforesaid, to Spokane, Wash., their class rates now in effect, and their rates now imposed for the transportation, in carloads, of the commodities hereinafter named.

It is further ordered, That the Northern Pacific Railway Company, the Great Northern Railway Company, the Chicago, Burlington & Quincy Railway Company, the Chicago & Northwestern Railway Company, the Union Pacific Railroad Company, the Oregon Railroad & Navigation Company, and the Oregon Short Line Railroad Company be, and they are hereby, notified and required to establish and put in force on or before the 1st day of May, 1909, and maintain for a period of not less than two years thereafter, the class rates for the transportation of commodities moving under the Western Classification from St. Paul, aforesaid, and from Chicago, aforesaid, to Spokane, Wash., which are named below in cents per 100 pounds, to wit:

From—	To Spokane.									
	Class.									
	1	2	3	4	5	A	B	C	D	E
	Cts.	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*
St. Paul	250	217	183	158	133	133	104	83	79	71
Chicago	300	259	216	179	150	154	121	97	91	82

It is further ordered, That said defendants last above named be, and they are hereby, notified and required to establish and put in force on or before the 1st day of May, 1909, and maintain for a period of not less than two years thereafter, for the transportation of the articles following, from St. Paul, aforesaid, and from Chicago, aforesaid, to Spokane, Wash., the rates, in cents per 100 pounds, following, to wit:

Commodity.	Rates from—	
	St. Paul	Chicago.
	Cents.	*Cents.*
Tin boxes and lard pails, n. o. s.	100	117
Boxed, crated, or jacketed	100	117
Nested in boxes, barrels, or crates	100	117
Carpets, n. o. s.	185	216
Plow points	110	128
Shovels, spades, scoops, in packages	135	157
Fruit jars and glasses	100	117
Canned corn	90	105
Canned beans	90	105
Canned peas	90	105
Belting, cotton or rubber	120	140
Bicycles, boxed	250	292
Bicycles, crated	250	292
Blank books and tablets	125	146
Books, n. o. s., boxed	140	163
Drugs and medicines	150	175
Cotton duck and denims, any quantity	150	175
Glass, common, window, under 68 inches	90	105
Glass, common, window, all sizes, n. o. s.	90	105
Paint, dry, in cans (packed in boxes or barrels), or in barrels, casks, kegs, kits, boxes, or iron drums	90	105
Paint, in oil, in cans (packed in boxes or barrels), or in barrels, cases, kegs, kits, boxes, or iron drums	90	105
White or red lead, dry or in oil, in cans (packed in boxes or barrels), or in barrels, casks, kegs, kits, boxes, or iron drums	90	105
Paper bags, plain	100	117
Paper bags, printed	100	117
Rubber boots and shoes	175	204
Saws, circular, etc., on boards	150	175
Saws, circular, etc., in boxes	150	175
Water heaters, gas or gasoline, instantaneous	170	198
Stoves and ranges (cast iron), cooking, etc.	130	148
Stoves, air-tight heaters (sheet iron)	150	175
Glassware, n. o. s.	120	140
Rope and cordage; cotton, hemp, jute, etc., in bales, boxes or barrels	125	146
Wheelbarrows, k. d., flat	90	105
Windmills, k. d.	135	157
Wire, copper	110	128
Wire, fencing, in rolls	80	93
Woodenware, in packages	125	146

The above commodity rates are in carloads, upon the same minimum as is applied to the transportation of the same commodities from said St. Paul and Chicago to Seattle, Wash.

Said report appears in Volume 15 in the reports of said Commission at page 326, to which reference is hereby made. Thereafter, the effective date of the order on the commodity rates named therein was postponed from time to time and said order has never become effective. The class rates prescribed by said order were made effective from St. Paul and Chicago and a corresponding system of class rates was inaugurated by the carriers from Missouri River territory. Later, about June 9, 1909, the City of Spokane filed its supplemental

complaint putting in issue other commodity rates from eastern defined points of origin to Spokane which had not been embraced in the original complaint, asking that joint rates be named from points east of Chicago to Spokane, both class and commodity. In this proceeding the City of Pendleton, Oregon, the Chamber of Commerce of Baker City, Oregon, the Commercial Club of La Grande, Oregon, the Commercial Club of Walla Walla, Washington, and the Merchants' Association of New York intervened. About 600 commodity rates were involved in the supplemental complaint. Thereafter, about the 7th day of June, 1910, the Commission made its certain report, being Opinion No. 1663, reported in Volume 19 at page 162 of the reports of said Commission, to which reference is hereby made, the opinion not being copied herein on account of its length. In connection with its report the Commission suggested certain class and commodity rates as proper to be established by your petitioners. No order was made establishing such rates, but the Commission invited complainants and defendants to file such criticisms as they might have of the rates proposed on or before August 15, 1910, and required the carriers to furnish an accurate and detailed account for certain representative months showing the revenue accruing to the carriers upon business actually handled under the then existing rates and the revenue which would have accrued upon the same business had the rates suggested by said Commission in said report of June 7, 1910, been in effect. On or before August 15, 1910, sundry complainants and defendants filed criticisms of said schedules and objections to said rates and neither the class nor the commodity rates suggested in said report of June 7, 1910, were ever ordered in by the Commission or established by the carriers.

XI.

By the Act of Congress, approved June 18, 1910, the fourth section of the Act to Regulate Commerce was amended so as to forbid the charging by common carriers subject to the provisions of said act of a greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. It was provided, however, that upon application to the Interstate Commerce Commission such common carriers might in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property and that the Commission might from time to time prescribe the extent to which such common carriers might be relieved from the operation of said Section 4. It was further provided that no rates or charges lawfully existing at the time of the passage of said amendatory act should be required to be changed by reason of the provisions of said Section 4 prior to the expiration of six months after the passage of said amendatory act, nor in any case where application should have been filed before the Commission, in accordance with the provisions of said section, until a determination of such application by said Commission. After the passage of the law amending the fourth section, as above shown, the Commission promulgated its certain order, of date October 14, 1910, whereby it prescribed the form under which it required the carriers within said period of six months to file their applications for relief from the provisions of said fourth section. Among other things the said form provided that the carriers should state that they desired to carry rates to the further point lower than rates concurrently in effect

to intermediate points and required them to state that the rate to the intermediate point should not be more than a certain number of cents per 100 pounds, per ton, per car or per package in excess of the rates to the further point. The rates which the competitive conditions above described have compelled your petitioners to make to the Pacific Coast terminals, being less for the longer haul to said terminals than the rates in effect to interior points involved in said proceeding No. 879, all of which last described rates were just and reasonable rates, your petitioners, notwithstanding they were advised by counsel that said Section 4 as amended by the act of June 18, 1910, was unconstitutional and void, as involving an unlawful delegation to said Commission of legislative power, and notwithstanding that said act, even if constitutional, did not require your petitioners' application to set forth the differential which they sought to maintain between the lower long haul and the higher short haul rates, yet in obedience to said Commission's order felt constrained, because of the penalties in said Act to Regulate Commerce against any violation of any of the provisions thereof, to file and did file with the Interstate Commerce Commission within the time allowed by said act as amended applications for leave to continue in effect said existing lower rates for the longer haul to the Pacific Coast terminals than the just and reasonable rates then in effect for the shorter haul to the interior points involved in said proceeding No. 879.

XII.

Thereafter, on March 20, 1911, said applications came on for hearing before said Commission and were heard by said Commission in connection with the submission by your petitioners of the information compiled, as required by said Commission's report of June 7, 1910, showing what would be the loss to your petitioners if they were required to put into effect the rates suggested in said report of June 7, 1910. Upon said hearing your petitioners submitted evidence in support of said applications. By the evidence so submitted it was established that said lower rates to said Pacific Coast terminals were compelled by the competitive conditions hereinabove described and that said rates were less than your petitioners might otherwise reasonably exact for the service rendered thereunder and that it was necessary for your petitioners to continue such rates in effect in order to meet said competitive conditions. Thereafter, and on June 22, 1911, said Commission made its report and order upon said applications and also its report and order in said proceeding No. 879. Your petitioners aver that by said report the Commission found that said lower rates to Pacific Coast terminals were compelled by said competitive conditions and were necessary to allow of the continued participation by your petitioners in the business of moving traffic to such terminals. Said reports appear as Opinions Nos. 1623 and 1627 of said Commission at pages 329 to 384 and 400 to 427 of Volume 21 of the reports of said Commission, to which your petitioners beg leave to refer. The order of said Commission made in said proceeding No. 879 is in terms as follows:

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 22d day of June, A. D. 1911.

PRESENT:

Judson C. Clements,
Charles A. Prouty,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Charles C. McChord,
Balthasar H. Meyer,
} Commissioners.

No. 879.

City of Spokane, Wash.; Chamber of Commerce of Spokane, Wash.; County of Spokane, Wash.; and Spokane Jobbers' Association of Spokane, Wash.,

vs.

Northern Pacific Railway Company; The Great Northern Railway Company; Union Pacific Railroad Company; Oregon-Washington Railroad & Navigation Company; Oregon Short Line Railroad Company, Canadian Pacific Railway Company; Chicago, Burlington & Quincy Railroad Compang; Chicago & North-Western Railway Company; The Lake Shore & Michigan Southern Railway Company; The New York Central & Hudson River Railroad Company; Pittsburgh, Fort Wayne & Chicago Railway Company; The Pennsylvania Railroad Company; The New York, New Haven & Hartford Railroad Company; Boston & Maine Railroad; and Spokane Falls & Northern Railway Company.

This case being at issue upon complaint and answers on file, and having been again duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission being of the opinion that the rates complained of and now in effect are in violation

of the fourth section of the act to regulate commerce; that an order should be made under the fourth section and that no other order should be made in this case at the present time; and being further of the opinion that for the purpose of making this order the territory of the United States should be divided into five zones as defined in the following paragraph of this order, and that rates from points of origin in Zone No. 1 to Spokane and Walla Walla, in the State of Washington, and Baker City, La Grande and Pendleton, in the State of Oregon, should not exceed those contemporaneously in effect from the same points of origin to Pacific Coast terminals; that from points of origin in Zones Nos. 2, 3 and 4 rates to the above-mentioned intermediate points may properly be higher than those contemporaneously in effect to Pacific Coast terminals, but should not exceed such terminal rates by more than 7 per cent. from Zone No. 2, 15 per cent. from Zone No. 3, and 25 per cent. from Zone No. 4; and that no finding should be made in this case with respect to rates from points of origin in Zone No. 5; thereupon:

It is ordered, That for the purposes of the disposition of this case the United States shall be divided into five zones, as described in the following manner (the transcontinental groups hereinafter described are as specified in R. H. Countiss, Agent's, Transcontinental Tariff I. C. C. No. 929):

Zone No. 1 comprises all that portion of the United States lying west of a line called Line No. 1, which extends in a general southerly direction from a point immediately east of Grand Portage, Minn.; thence southwesterly, along the northwestern shore of Lake Superior, to a point immediately east of Superior, Wis.; thence southerly, along the eastern boundary of Transcontinental Group F, to the intersection of the Arkansas and Oklahoma state line; thence along the west side of the Kansas City Southern Railway to the Gulf of Mexico.

Zone No. 2 embraces all territory in the United States lying east of Line No. 1 and west of a line called Line No. 2, which begins at the international boundary between the United States and Canada, immediately west of Cockburn Island, in Lake Huron; passes westerly through the Straits of Mackinaw; southerly, through Lake Michigan to its southern boundary; follows the west boundary of Transcontinental Group C to Paducah, Ky.; thence follows the east side of the Illinois Central Railroad to the southern boundary of Transcontinental Group C; thence follows the east boundary of Group C to the Gulf of Mexico.

Zone No. 3 embraces all territory in the United States lying east of Line No. 2 and north of the south boundary of Transcontinental Group C, and on and west of Line No. 3, which is the Buffalo-Pittsburg line from Buffalo, N. Y., to Wheeling, W. Va., marking the western boundary of Trunk Line Freight Association territory; thence follows the Ohio River to Huntington, W. Va.

Zone No. 4 embraces all territory in the United States east of Line No. 3 and north of the south boundary of Transcontinental Group C.

Zone No. 5 embraces all territory south and east of Transcontinental Group C.

It is further ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist on or before the 15th day of November, 1911, and for a period of not less than two years thereafter abstain, from maintaining rates from points of origin in Zone No. 1 to Spokane and Walla Walla, in the State of Washington, and to La Grande, Baker City and Pendleton, in the State of Oregon, which are higher than those contemporaneously maintained from the same points of origin to Pacific Coast terminals; from points

of origin in Zone No. 2 such rates to the above intermediate points shall not exceed those to Pacific Coast terminals by more than 7 per cent.; from points of origin in Zone No. 3 said intermediate rates shall not exceed the terminal rates by more than 15 per cent.; from points of origin in Zone No. 4 by not more than 25 per cent.; and that no order be now made as to Zone No. 5.

And it is further ordered, That this case be reserved for such further order upon the present findings, or for such further investigation, as may be necessary to secure to the complaining localities above specified just and lawful rates, if in view of the rates established in accordance with this order further proceedings seem necessary.

XIII.

Your petitioners allege that the fourth section of said Act to Regulate Commerce as amended by said act of June 18, 1910, is unconstitutional and void, in that by said section as amended congress has assumed to delegate legislative powers to said Commission; that by said section as so amended said Commission is empowered arbitrarily to grant or withhold leave to charge less for the longer than for the shorter haul of like commodities over the same line in the same direction and that no standard is supplied by said section or by any of the provisions of said Act to Regulate Commerce for the guidance or control of said Commission in passing upon applications made thereunder for leave to charge such lower rates for the longer than for the shorter haul and that therefore said order of the Commission made in said proceeding No. 879, and which by its terms professes to be made and in fact was made by said Commission under the supposed authority conferred upon them by said amended fourth section is unlawful and void.

XIV.

Your petitioners further allege that assuming said Section 4 of said Act to Regulate Commerce as amended by said Act of June 18, 1910, to be a constitutional enactment, the Commission erred in making its order of June 22, 1911, in said proceeding No. 879, in that it assumed to dispose and did dispose of all of the issues raised in said proceeding in connection with the applications made by your petitioners as aforesaid for relief from the operation of said Section 4. Said order of June 22, 1911, hereinabove set forth, does not prescribe, nor has said Commission ever prescribed, any rates to be charged by your petitioners upon traffic moving to the interior points involved in said proceeding No. 879, other than the class rates fixed by the Commission in said order of February 9, 1909, which said rates have by your petitioners been made effective as hereinbefore stated. Said order of June 22, 1911, prescribes no specific class or commodity rates whatsoever to be made by your petitioners to said interior points, and therefore your petitioners are left free, so far as the terms of said order go, to continue to charge to said interior points involved in said proceeding the class rates heretofore fixed by said Commission, or to charge such less rates thereto in the instances of specific commodities as your petitioners may from time to time see fit to make or may be required to make by controlling competitive conditions. But the effect of said order is to allow your petitioners to do this only upon the condition that the rates so made shall in no case exceed to said interior points involved in said proceeding rates concurrently in effect from the territory described in said order as Zone No. 1 and that they shall in no case exceed by more than 7 per cent., 15 per cent., 25 per cent., respectively, the rates concurrently charged by your petitioners to

said Pacific Coast terminals from the respective territories described in said order as Zones Nos. 2, 3 and 4.

XV.

Your petitioners respectfully show that to advance rates from the zones described in said order to Pacific Coast terminals, so that they shall bear to just and reasonable rates from said zones to the interior points involved in said proceeding No. 879 the relations which by said order of June 22, 1911, they are required to bear, would result in great and irreparable loss to your petitioners, in that the rates so advanced would be so greatly in excess of the rates made by water carriers to said Pacific Coast terminals that practically all of the transcontinental traffic now moving to said terminals over the lines of your petitioners would be diverted to said water carriers and lost to your petitioners; that while this effect would not be immediate, because the number of vessels now available for this service is not sufficient to carry the whole of such traffic, such an advance would result in the immediate loss to your petitioners of a large part of said traffic and in the ultimate loss of practically the whole thereof as soon as vessels could be built and equipped to carry the same. The effect of said order therefore is to require your petitioners to suffer great and irreparable loss, either by the reduction of their present rates to the points involved in said proceeding No. 879 below the rates heretofore prescribed by said Commission in their order of February 9, 1909, as just and reasonable, and below any rates which competitive conditions require your petitioners to make at said points, or by the surrender of their terminal traffic to competing water carriers. Your petitioners aver and insist that said Commission was and is without authority under the fourth secton of said Act

to Regulate Commerce (even assuming the same to be constitutional) or any of the provisions of said section to make any order in said proceeding No. 879 other than an order prescribing definite, just and reasonable rates to be charged as maxima to said points and that the order of June 22, 1911, hereinabove set forth, is unauthorized and void.

XVI.

Though the rates now charged by your petitioners on transcontinental traffic moving to Pacific Coast terminals are not fully compensatory and are not as great as your petitioners might reasonably exact for the service rendered, they yield your petitioners something in excess of the out-of-pocket expense incident to the handling of the traffic moving under said rates, and therefore contribute something to the return which your petitioners are entitled to earn upon their properties, and said order of said Commission in requiring your petitioners to forego said terminal business or to reduce their rates to interior points below the just and reasonable rates which they are entitled to charge will result in the taking of your petitioners' property without due process of law and is confiscatory and void. If in order to continue in the business of moving traffic to the Pacific Coast terminals your petitioners were to comply with the requirements of said order of June 22, 1911, by depressing their rates to interior points so that the same should not exceed from Zone No. 1 the rates from Zone No. 1 to the Pacific Coast terminals and so that the same should not exceed from the other zones described in said order the rates to said Pacific Coast terminals by more than the differentials prescribed in said order, your petitioners would be required to accept and carry the business moving to said interior points at rates so low that the entire

revenue therefrom, together with all other revenues accruing to your petitioners, would not be a fair return upon the fair value of your petitioners' property devoted to the public service.

XVII.

Your petitioners further say that the rates now in effect both to interior points and to the Pacific terminals, while they have varied from time to time to meet the exigencies of commerce, are all based and have for many years been based upon a well defined principle and the commerce of the territory to which said rates apply has been adjusted to said principle and has grown and prospered under the application of it. Such principle consists in the establishment of just and reasonable standard class rates applying on practically the whole of the tonnage moving to said territories (except, as hereinbefore stated, such bulky tonnage as lumber, coal and grain, the rates upon which are not involved in said proceeding No. 879) and in making only such exceptions to such standard rates in the way of specific commodity rates as competition has from time to time required your petitioners to make; and there is no occasion or justification for departing from said standard class rates except as competition does require it. The order of June 22, 1911, requires your petitioners (unless they shall elect to forego said terminal traffic as hereinabove stated) to supersede said just and reasonable standard class rates as to the great volume of the tonnage moving to said interior points involved in said proceeding No. 879 by establishing to said points from Zone No. 1 the special commodity rates now in effect at said terminal points and by establishing from the remaining zones therein described to interior points the terminal rates plus the differentials allowed by

said order, although competition has never required your petitioners to make such rates at said interior points, and although said rates would be less than just and reasonable rates to said interior points, and although the Commission has never in fact found them to be just or reasonable. As a consequence, the principle of fixing standard class rates to be charged as maxima to said interior territory, except when competitive conditions require a departure from them, is overthrown and the rates which your petitioners are compelled to accept at terminal points are wrongfully made the measure of what they may lawfully receive at said interior points.

XVIII.

To comply with the order of the Commission upon said application your petitioners will be obliged to readjust rates now in effect from Missouri River territory and all points east thereof to said interior points involved in said proceeding No. 879, either by raising rates to said terminal points and thus diverting and losing terminal traffic to competing water carriers, or by lowering said rates to interior points, and will be forced to move traffic in accordance with such changed rates and will lose the vast amount of revenue to which they are lawfully entitled and which they will be unable thereafter to demand or collect. The adjustment proposed in the order of the Commission will also disorganize business conditions in the territory affected by such order and greatly prejudice producers and shippers therein and result in the destruction of business in many localities.

XIX.

In all of said territory described as Zone 1 in said order and from territory east thereof and west thereof there are now in effect numerous rates reasonable in and of themselves for the service to be performed under them from points in said territory to the territory involved in said proceeding No. 879. Yet, because of the order of the Commission, numerous rates, so reasonable in and of themselves, will have to be reduced (unless your petitioners elect to forego said terminal traffic as aforesaid) and made less than just or reasonable. Your petitioners are entitled before these rates are reduced to have them investigated by the Commission and they may be rightfully reduced only after such investigation and after determination of unreasonableness on the part of the Commission and the naming by the Commission in their stead of rates as maxima which shall be just and reasonable for the service performed. Yet, without the establishment of such just and reasonable rates, solely because of said order, such reduction must be made or the terminal rates advanced to a point where, as aforesaid, they will drive the terminal traffic to the water carriers. The Commission in passing upon said applications and in making said order in case No. 879 acted arbitrarily and without authority of law in fixing zones and percentages applicable to all traffic, regardless of whether or not the percentages fixed would permit the traffic to move to terminal points, while at the same time securing reasonable rates to the intermediate points. Your petitioners say if said order is not enjoined or set aside by this court it will on the 15th day of November become effective and remain in force for two years thereafter, and your petitioners will have to adjust their tariffs and make their charges in accordance

with said order; that irreparable loss will thereby result to your petitioners, in that the loss of revenue occasioned by the diversion of terminal business to water carriers, or by reason of the lower rates which your petitioners will be required to make to intermediate points, will be many hundreds of thousands of dollars.

XX.

While your petitioners the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, Milwaukee & Puget Sound Railway Company are not parties to said proceeding, No. 879, and the order in said proceeding herein complained of does not run against them or either of them, it will be necessary for them to establish rates in compliance therewith if the lines named in said order shall be required to comply therewith and they will be irreparably damaged in consequence thereof.

XXI.

Wherefore, your petitioners pray that due service of this petition be made on respondent herein commanding it to answer the matter thereof (but not under oath, answer under oath being expressly waived); that notice of the application for injunction hereby made be duly served on the respondent, on the Attorney General of the United States and on the Interstate Commerce Commission; that pending the final hearing of this petition temporary injunction shall issue enjoining the defendant and the Interstate Commerce Commission and its members, their agents, servants and representatives, from enforcing the said order of June 22, 1911, and from taking any steps or instituting any proceedings for the enforcement thereof, and that, after hearing, a decree be entered herein

perpetuating said injunction and setting aside and annulling said order and declaring said fourth section as amended to be unconstitutional and void and perpetually enjoining the enforcement thereof, and for such other and further relief, general and special, in the premises as justice and equity may require.

UNION PACIFIC RAILROAD COMPANY.

By A. H. Loomis
H. A. Scandrett
F. C. Dillard
Its Solicitors.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY.

By H. H. Cotton
H. A. Scandrett
F. C. Dillard
Its Solicitors.

OREGON SHORT LINE RAILROAD COMPANY.

By P. L. Williams
H. A. Scandrett
F. C. Dillard
Its Solicitors.

NORTHERN PACIFIC RAILWAY COMPANY.

By C. H. Burn
Charles Donnelly
Its Solicitors.

GREAT NORTHERN RAILWAY COMPANY.

By R. A. Jackson

E. C. Lindley

Its Solicitors.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

By C. M. Dawes

R. B. Scott

Its Solicitors.

CHICAGO & NORTH-WESTERN RAILWAY COMPANY.

By E. N. Hyzer

E. C. Wright

Its Solicitors.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

By Burton Hanson

Jno. Ellis

Its Solicitors.

CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY.

By Burton Hanson

Jno. Ellis

Its Solicitors.

CANADIAN PACIFIC RAILWAY COMPANY.

By...A. H. Bright.....

.....

Its Solicitors.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

By...A. H. Bright.....

.....

Its Solicitors.

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

F. H. Plaisted.....Being duly sworn, deposes and says that he is an officer of the Chicago Short Line Railroad Co. Company, one of the above named petitioners, and makes this affidavit on behalf of said railway company and the other petitioners herein: that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated as to information and belief and as to those matters he believes them to be true.

F. H. Plaisted

Subscribed & sworn to before me this 26th day of September 1911

Wm. A. Rauson

Notary Public.

(Notarial Seal)

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

J. A. Munroe ..... Being duly sworn, deposes and says that he is an officer of the Union Pacific R.R. Co. Company, one of the above named petitioners, and makes this affidavit on behalf of said railway company and the other petitioners herein; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated as to information and belief and as to those matters he believes them to be true.

Subscribed & sworn to before me this 28th day of September 1911

J. A. Munroe

Wm A Rawson

Notary Public.

(Notarial Seal)

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

J. G. Woodworth ..... Being duly sworn, deposes and says that he is an officer of the Northern Pacific Railway Company, one of the above named petitioners, and makes this affidavit on behalf of said railway company and the other petitioners herein; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated as to information and belief and as to those matters he believes them to be true.

Subscribed & sworn to before me this 28th day of September 1911

J. G. Woodworth

Wm A Rawson

Notary Public.

(Notarial Seal)

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

E. D. Sewall ..... Being duly sworn, deposes and says that he is an officer of the Chicago, Milwaukee & Puget Sound Ry Co. Company, one of the above named petitioners, and makes this affidavit on behalf of said railway company and the other petitioners herein; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated as to information and belief and as to those matters he believes them to be true.

E. D. Sewall

E. D. Millard
Notary Public.

(Notarial Seal)

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

C. G. Burnham ..... Being duly sworn, deposes and says that he is an officer of the Chicago, Burlington & Quincy RR Company, one of the above named petitioners, and makes this affidavit on behalf of said railway company and the other petitioners herein; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated as to information and belief and as to those matters he believes them to be true.

C. G. Burnham

J. H. Pettibone
Notary Public.

(Notarial Seal)

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

.....Being duly sworn, deposes and says that he is an officer of the..... Company, one of the above named petitioners, and makes this affidavit on behalf of said railway company and the other petitioners herein; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated as to information and belief and as to those matters he believes them to be true.

.....

.....

Notary Public.

108 *Motion for restraining order.*

(Filed October 4, 1911.)

In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY ET AL., PETITIONERS,
v.
UNITED STATES OF AMERICA, RESPONDENT. } No. 51.

MOTION FOR RESTRAINING ORDER.

Now come petitioners in the above-styled cause and exhibit herewith their petition filed in this court. They say that the order complained of in said petition will become effective on the 15th day of November, unless enjoined, set aside, or suspended by this court and that the tariffs herein called for will have to be filed at an early date, unless such order is suspended, enjoined, or set aside, and that as appears from said petition the filing of said tariffs and the putting into effect of said order will subject your petitioners to great and irreparable injury, as is set forth in said petition. The publication of the tariffs will be attended with heavy expense, and thereby also subjecting your petitioners to irreparable injury.

Wherefore petitioners pray that this motion and the matter of the petition requesting a restraining order and temporary injunction be set down for hearing at an early day, and that upon such hearing this court grant a temporary injunction and restraining order, suspending the order of the commission complained of in the petition until such time as the court can hear said petition and make its order in the premises.

F. C. DILLARD,
ROBERT DUNLAP,
T. J. NORTON,
Attorneys for Petitioners.

109 *Acceptance of notice of hearing.*

(Filed October 4, 1911.)

In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY ET AL.
v.
UNITED STATES OF AMERICA. } No. 51.

Service is hereby accepted of notice of the hearing of the application for a temporary injunction and restraining order in the above case by the United States Commerce Court on October 17, 1911, and formal notice is hereby waived.

BLACKBURN ESTERLINE,
For the United States.
P. J. FARRELL,
For I. C. C.

110 (Duplicate.)

Notice to Attorney General.

(Filed October 4, 1911.)

In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY, ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } No. 51.

The President of the United States to Honorable George W. Wickersham as Attorney General of the United States:

You are hereby notified that a petition has been filed in the above-entitled case in the office of the clerk of the United States Commerce Court at Washington, D. C., copy of which is herewith served by filing said copy in the Department of Justice.

In case no answer shall be filed to said petition within thirty days after such service, the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, presiding judge of the United States Commerce Court, this 4th day of October, A. D. 1911.

G. F. SNYDER, *Clerk.*

(Seal of United States Commerce Court.)

Original of above notice and copy of petition served upon Honorable George W. Wickersham, Attorney General of the United States, this 5th day of October, A. D. 1911. Accepted by Blackburn Esterline.

F. J. STAREK, *Marshal.*

111 (Duplicate.)

Notice to chairman of Interstate Commerce Commission.

(Issued October 4, 1911.)

In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY, ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } No. 51.

The President of the United States to Hon. Judson C. Clements as chairman of the Interstate Commerce Commission:

You are hereby notified that a petition has been filed in the above-entitled case in the office of the clerk of the United States Commerce Court at Washington, D. C., copy of which is herewith served by filing said copy in the office of the secretary of the Interstate Commerce Commission.

In case no answer shall be filed to said petition within thirty days after such service, the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, presiding judge of the United States Commerce Court, this 4th day of October, A. D. 1911.

G. F. SNYDER, *Clerk.*

(Seal of United States Commerce Court.)

Original of above notice and copy of petition served upon Edward A. Moseley, secretary of the Interstate Commerce Commission, this 5th day of October, A. D. 1911. Accepted by J. H. Howell.

F. J. STAREK, *Marshal.*

112 *Appearance.*

(Filed October 7, 1911.)

In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY, OREGON-Washington Railroad & Navigation Company, Oregon Short Line Railroad Company, Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago & North Western Railway Company, Chicago, Milwaukee & St. Paul Railway Company, Chicago, Milwaukee & Puget Sound Railway Company, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, petitioners, *v.* UNITED STATES OF AMERICA, RESPONDENT.	In Equity. No. 51.

Appearance.

To Mr. G. F. Snyder, clerk of said court:

I hereby enter herein the appearance of the Interstate Commerce Commission as a party respondent, and of myself as its solicitor.

Dated October 6, 1911.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission, Respondent.

113 *Answer of Interstate Commerce Commission.*

(Filed October 14, 1911.)

In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY; OREGON-WASHington Railroad & Navigation Company; Oregon Short Line Railroad Company; Northern Pacific Railway Company; Great Northern Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & North Western Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Puget Sound Railway Company; Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company, petitioners, v. UNITED STATES OF AMERICA, RESPONDENT, AND INTERstate Commerce Commission, intervening respondent.	In Equity, No. 51.

ANSWER OF INTERSTATE COMMERCE COMMISSION.

The Interstate Commerce Commission, one of the parties respondent in the above-entitled cause, now and at all times
114 hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners' petition contained, for answer thereunto, or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answers and says:

This respondent admits that, in a proceeding instituted before it by the city of Spokane, Wash., and numbered 879 on this respondent's docket, it made and entered an order dated June 22, 1911, as set forth in Paragraph XII of the petition in this suit, and alleges that said order was, subsequent to said June 22, duly served upon the petitioners herein.

This respondent further alleges that, prior to the time it made and entered said order, as aforesaid, it made an investigation and gave to said petitioners the full hearing provided for in and by section 15 of the act to regulate commerce, and otherwise qualified itself to make, enter, and serve said order, as aforesaid, by performing in the premises each of and all the duties imposed upon it by law, including the duties specifically mentioned in sections 13, 14, and 15 of said act; that at said hearing inquiry was, as shown by this respondent's report in the premises, and by Paragraphs X, XI, and XII of the petition herein, directed to the questions of whether the rates of said petitioners for the transportation of freight traffic from points of origin in territory included in zones 1 to 4,
115 inclusive, mentioned in said order, to Spokane and Walla Walla, in the State of Washington, and La Grande, Baker City, and Pendleton, in the State of Oregon, as compared with the rates contemporaneously exacted by said petitioners for the transportation of freight traffic from said points of origin to Pacific coast terminals, were in violation of section 4 of said act; that, as shown in and by said report and said order, this respondent determined said questions and concluded that the aforesaid rates to Spokane, Walla Walla, La Grande, Baker City, and Pendleton, aforesaid, as compared with said rates to Pacific coast terminals, were unjustly discriminatory and in violation of section 4 of said act, and that the rates which it would be reasonable for said petitioners to exact, as maxima, for two years from November 15, 1911, from said points or origin to Spokane, Walla Walla, La Grande, Baker City, and Pendleton, aforesaid, would not exceed the rates contemporaneously exacted by said petitioners from said points of origin to said Pacific coast terminals, except to the extent of 7 per cent from said zone No. 2, to the extent of 15 per cent from said zone No. 3, and to the extent of 25 per cent from said zone No. 4, as shown in and by said order; that in making the determination and forming the conclusions, aforesaid, this respondent considered every fact, circumstance, and condition mentioned in said petition, including different kinds of competition, as they existed at the date of said order and as they had existed prior to said date, and also con-

sidered and weighed carefully, conscientiously, and in good
116 faith, in the light of its own knowledge and experience in the premises, every other fact, circumstance, and condition called to its attention by the parties to said proceeding and their counsel; that the conclusions alleged in Paragraphs XV to XX, inclusive, of said petition, are based entirely upon speculation and are unwarranted, and this defendant therefore denies the truth of each of and all said allegations.

In this connection this respondent alleges that the class rates in effect on said June 22, 1911, and applicable to the transportation of freight traffic over said petitioners' lines of railway from points in zones 1 to 4, inclusive, aforesaid, to Pacific coast terminals, were as follows:

Classes	1	2	3	4	5	A	B	C	D	E
Rates	$3	$2.60	$2.20	$1.90	$1.65	$1.60	$1.25	$1	$1	$0.95

That subsequent to said June 22, said petitioners made extensive increases in said rates, some of which will become effective on November 1, 1911, and the others of which will become effective on November 15, 1911; and that such rates as thus increased will be on said November 1 and said November 15, in a great many instances, from points in zones 2, 3, and 4, aforesaid, as shown in the following table, namely:

Classes	1	2	3	4	5	A	B	C	D	E
Rates:										
Zone 4	$3.70	$3.20	$2.65	$2.25	$1.90	$1.92	$1.52	$1.20	$1.15	$1.05
Zone 3	3.60	3.10	2.60	2.20	1.85	1.87	1.48	1.17	1.12	1.00
Zone 2	3.50	3.03	2.52	2.15	1.80	1.82	1.45	1.15	1.10	.98

This respondent particularly denies that in making and
117 entering said order as aforesaid, this respondent transcended the powers conferred upon it by said act; denies that the effect of said order will be either to confiscate the property of any of said petitioners or to deny to any of said petitioners due process of law; and denies that said order will deprive any of said petitioners either of the just compensation or of the fair return upon its property to which it is entitled under the Constitution and other laws of the United States.

Except as herein expressly admitted, this respondent denies the truth of each of and all the allegations contained in said petition in so far as they conflict either with the allegations herein or with either the statements or conclusions of fact included in said report, which is hereby referred to and made a part hereof.

All of which matters and things this respondent is ready to aver, maintain, and prove as this honorable court shall direct, and thereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By P. J. FARRELL, *Its Solicitor.*

CITY OF WASHINGTON,
District of Columbia, ss:

Charles A. Prouty, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-

118 named respondent, and makes this affidavit on behalf of said commission; that he had read the foregoing answer and knows the contents thereof, and that the same is true.

CHARLES A. PROUTY.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia, this 14th day of October, 1911.

[Notarial seal.] H. S. MILSTEAD,
Notary Public.

145 *Petition of intervention.*

(Filed October 16, 1911.)

In the United States Commerce Court.

UNION PACIFIC RAILWAY COMPANY, PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT.
} No. 51. Intervention petition.

Come now city of Spokane, Washington; County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and the Spokane Jobbers' Association of Spokane, Washington, and respectfully petition and show to this honorable court as follows:

I.

That the city of Spokane and the county of Spokane are municipal corporations under the constitution and laws of the State of Washington; and that the chamber of commerce is a corporation under the laws of the State of Washington; and that the Spokane Jobbers' Association of Spokane, Washington, is an association of jobbers and shippers of the city of Spokane.

II.

That your petitioners herein were and are the complainants before the Interstate Commerce Commission in case No. 879 (being the first case filed with and before the Interstate Commerce Commission after the so-called Hepburn amendment of the commerce law became effective) against the Northern Pacific Company et al., in which case the original petition was filed more than five years since.

III.

146 That your petitioners are interested in this action and proceeding and were and are interested in the proceeding and case above mentioned before the Interstate Commerce Commission, and in which orders were made, and desire to appear as parties to and in this action and be represented by their counsel.

IV.

That in this suit and action before this court the orders made in the said proceeding No. 879 are involved, and the validity of such orders involved the rights and interests of your petitioners, and in

this action and proceeding are involved alleged orders made upon the application of the petitioners herein upon and under the amended 4th section of the commerce act with reference to long and short haul transportation and charges therefor.

Wherefore your petitioners pray that an order be made and entered herein granting and allowing them leave and right to intervene and to appear as parties in this action and to be represented by their counsel as and to the extent authorized by law and the rules of equity practice and procedure.

And your petitioners will every pray.

A. M. CRAVEN,
Corporation Counsel of the City of Spokane.
JOHN WILEY,
Prosecuting Attorney of the City of Spokane.
J. B. CAMPBELL,
H. M. STEPHENS,
Attorneys for Petitioners.

147 UNITED STATES OF AMERICA,
City of Washington, District of Columbia, ss:

H. M. Stephens, being first duly sworn upon oath, deposes and says he is one of the attorneys for the petitioners making and filing this petition herein, and makes this verification for and on behalf of said petitioners and each of them; that affiant personally knows the matters and things set forth and stated in said petition; that the matters and things stated and set forth in said petition are true as affiant verily believes.

H. M. STEPHENS.

Subscribed and sworn to this 16th day of October, A. D. 1911.
[NOTARIAL SEAL.] ARTHUR J. WAND,
Notary Public,
Residing at Washington, District of Columbia,
United States of America.

148 *Petition of intervention.*

(Filed October 17, 1911.)

In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY AND OTHERS, PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } No. 51.

PETITION OF INTERVENTION.

To the Honorable Judges of the United States Commerce Court:

The Chicago Association of Commerce asks leave to intervene in the above-entitled case, and in support thereof alleges and says:

That it is a corporation organized and existing under the laws of the State of Illinois; that its principal office is at Chicago, in said State, and that it has for its purpose the promotion and protection of the business interests of Chicago;

That its membership is composed of practically all the wholesale and retail mercantile houses, manufacturing institutions, and financial institutions of said city of Chicago, and that the number of its members is approximately four thousand (4,000);

That it was an intervener in a proceeding before the Interstate Commerce Commission known as No. 879, entitled "City of
149 Spokane, Washington, and others, vs. Northern Pacific Railway Company and others," the original order in which was entered by the Interstate Commerce Commission on the 9th day of February, A. D. 1909, and a further order in which was entered by the Interstate Commerce Commission on the 22nd day of January, A. D. 1911, both of which said orders are fully set out in the petition in the above-entitled case;

That approximately fifty-seven (57) per cent of the total westbound Pacific coast terminal tonnage originates at Chicago and points west thereof, and that the members of said Chicago Association of Commerce are engaged in the sale of goods and merchandise of various descriptions that are shipped to Pacific coast terminals and to intermediate points involved in the orders of the Interstate Commerce Commission hereinbefore referred to;

That the said Chicago Association of Commerce, in behalf of its members, was and is interested in the proceeding before the Interstate Commerce Commission, hereinbefore referred to, and the orders entered by the Interstate Commerce Commission therein; and that it is interested in the enforcement of said orders in behalf of its membership, for the reason that the goods and merchandise shipped by its members to Pacific coast terminals and to intermediate points move, in many instances, under the rates set forth in said orders of the Interstate Commerce Commission, which said orders form the subject matter of the petition in the above-entitled case:

Wherefore the said Chicago Association of Commerce prays that it be made a party to said suit by intervening therein, and
150 that it be allowed to file answer as provided by law, and that it receive notice of all proceedings pertaining thereto in the same manner and to the same extent as though named as such intervener at the time the original petition was filed herein; that said notice as aforesaid be sent to the Chicago Association of Commerce, Great Northern Building, Chicago, or to its attorneys, Cassoday, Butler, Lamb and Foster, 1414 Monadnock Block, Chicago.

CHICAGO ASSOCIATION OF COMMERCE,
By H. C. BARLOW,
Traffic Director.
CASSODAY, BUTLER, LAMB & FOSTER,
Attorneys for Intervener.

RUSH C. BUTLER,
WILLIAM E. LAMB,
STEPHEN A. FOSTER,
CORNELIUS LYNDE,
Of Counsel.

151 STATE OF ILLINOIS, *County of Cook, ss:*

William E. Lamb, being first duly sworn, on oath deposes and says that he is one of the attorneys for the intervener above named; that he knows the facts stated in said petition of intervention, and that the same are true.

WILLIAM E. LAMB.

Subscribed in my presence and sworn to before me by said William E. Lamb this 14th day of October, A. D. 1911.

[NOTARIAL SEAL.] D. V. RUBIDGE,
Notary Public.

152 *Order permitting city of Spokane et al. to intervene.*

(Entered October 18, 1911.)

In the United States Commerce Court.

UNION PACIFIC RAILWAY COMPANY, petitioners, *vs.* UNITED STATES OF AMERICA, RESPONDENT.	No. 51. Order of Intervention.

The petition and application of the city of Spokane, Washington; county of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and the Spokane Jobbers' Association of Spokane, Washington, coming on to be heard and determined by this court, and it appearing to the satisfaction of this court that the matters and things alleged and set forth in the intervention petition of said parties are sufficient to entitle the said petitioners to intervene and appear herein and become parties to this action as of right, and to be represented by their counsel:

Wherefore it is hereby ordered that the city of Spokane, Washington; county of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and the Spokane Jobbers' Association of Spokane, Washington, be, and are, and that each of them is, hereby permitted to appear as parties herein and hereto, and to intervene in this action as of right and be represented by their counsel, and to take such action and such part in this proceeding and action as they may determine, subject to the provisions of the law in such cases made and provided and the rules and practice of this court, and equity procedure and practice in general.

Done in open court this 18th day of October, A. D. 1911.

MARTIN A. KNAPP,
Presiding Judge.

153 *Answer of City of Spokane et al.*

(Filed October 18, 1911.)

In the United States Commerce Court,

October term, 1911.

UNION PACIFIC RAILWAY COMPANY ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENTS. } No. 51.

ANSWER OF INTERVENERS.

Come now interveners, city of Spokane, Washington; county of Spokane, Washington; Chamber of Commerce of Spokane, Washington; Spokane Jobbers' Association, of Spokane, Washington, and for answer to the petition of the original petitioners herein—

I.

Admit the allegations contained in paragraph No. 1 of said petition.

154 II.

Admit the allegations contained in paragraph No. 2 of said petition.

III.

Admit the allegations contained in paragraph No. 3 of said petition, except that the petitioners compete with each other and water carriers, and interveners deny that the petitioners compete with each other or with water carriers, or with any water carrier for business to the Pacific coast.

IV.

Admit that freight moves to a limited extent over the lines of the petitioners or some of them under the classes mentioned in paragraph 4 of the petition herein, and that the class rates to the Pacific coast terminals are as set forth in paragraph No. 4, and deny each and every other allegation, matter, and thing contained in paragraph No. 4 of said petition.

V.

Admit that freight can be and is transported by water from the Atlantic seaboard to the Pacific coast, and that freight can be and is transmitted by water from the Atlantic coast to the Isthmus
155 of Tehuantepec and Panama, and thence by rail to the Pacific

coast, and thence by water to the Pacific coast terminals, and deny each and every other allegation, matter, and thing contained in paragraph No. 5 of the petition herein.

VI.

Admit that traffic moves to Pacific coast points from the Orient and other foreign nations, and deny each and every other allegation, matter, and thing contained in paragraph No. 6 of the petition herein.

VII.

Admit that the railways converge at the points mentioned in paragraph No. 7 of the petition herein, and deny each and every other allegation, matter, and thing contained in paragraph No. 7 of the petition herein.

VIII.

Admit that blanket rates exist from Missouri River points and points east thereof to Pacific coast terminals, and deny each and every other allegation, matter, and thing contained in paragraph No. 8 of the petition herein.

IX.

Admit that much lower rates exist from Missouri River
156 points and all points east thereof to Pacific coast terminals than exist to such points as Spokane and Walla Walla, Washington, Baker City, La Grande, and Pendleton, Oregon, or other like interior points, and that such difference is much greater than the per cents mentioned in paragraph No. 9 of the petition herein, and deny each and every other allegation, matter, and thing contained in paragraph No. 9 of the petition herein.

X.

Admit the allegations contained in paragraph No. 10 of said petition.

XI.

Admit the commerce act as amended by Congress June 18, 1910, and that such amendment is as set forth in the act of commerce, and admit that the carriers filed an application for permission to charge more for shipments for the longer distance over the same line in the same direction, the shorter haul being included within the longer haul, and thereby applied for relief to the Interstate Commerce Commission to charge more to Pacific coast terminals than to interior points, such as Spokane, Washington, and deny each and every other allegation, matter, and thing contained in paragraph No. 11 of the petition herein.

157 XII.

Admit that the hearing upon the applications for relief under the amended fourth section came on for hearing March 20, 1911, and that authority of the commission was given, as set forth in paragraph No. 12 of the petition herein, which reports are found in Interstate Commerce Commission Reports in the volumes and pages stated in said paragraph No. 12, and deny each and every other allegation, matter, and thing contained in paragraph No. 12 of the petition herein.

XIII.

Deny each and every allegation, matter, and thing contained in paragraph No. 13 of the petition herein.

XIV.

Deny each and every allegation, matter, and thing contained in paragraph No. 14 of the petition herein.

XV.

Deny each and every allegation, matter, and thing contained in paragraph No. 15 of the petition herein.

XVI.

158 Admit that the rates charged to Pacific coast terminals are in excess of out-of-pocket expense incident to the handling of traffic moving under said rates, and deny each and every other allegation, matter, and thing contained in paragraph No. 16 of the petition herein.

XVII.

Deny each and every allegation, matter, and thing contained in paragraph No. 17 of the petition herein.

XVIII.

Deny each and every allegation, matter, and thing contained in paragraph No. 18 of the petition herein.

XIX.

Admit rates will become effective Nov. 15, 1911, if not enjoined, in accordance with the decisions, conclusions, findings, and reports of the Interstate Commerce Commission referred to in the affirmative matter pleaded in this answer, and deny each and every other allegation, matter, and thing contained in paragraph No. 19 of the petition herein.

XX.

Admit the allegations contained in paragraph No. 20 of said
159 petition, except irreparable damage, and deny that the said carriers mentioned in said paragraph No. 20 or either thereof will be irreparably or at all damaged.

Further answering the petition of the petitioners herein, the interveners, city of Spokane, Washington; county of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and the Spokane Jobbers' Ass'ciation, of Spokane, Washington, allege—

I.

That the Interstate Commerce Commission has made and filed its findings of fact in what are known as the "intermountain" cases, to wit: Spokane Case No. 879, Nevada Case No. 1665, the Arizona Case No. 1796, and the Salt Lake Case No. 2662. That in said cases findings of facts, conclusions, decisions, and reports have been made by the Interstate Commerce Commission after a full, fair, and complete hearing, and the findings, decisions, conclusions, and reports made in the said cases are, as your interveners verily believe, more favorable to the petitioners herein than they are, or either of them is, entitled to.

II.

That said findings, conclusions, decisions, and reports are
160 binding and conclusive upon the carriers, and for the purpose of this case and action the facts are as found by the Interstate Commerce Commission in the cases mentioned.

III.

That reference is hereby made to the findings, decisions, conclusions, and reports in said cases and each of them, and unless this court takes judicial knowledge or notice thereof your interveners desire to have the same considered and become a part and parcel of this their answer herein.

IV.

Your interveners allege that the said findings, decisions, conclusions, and reports of the Interstate Commerce Commission show conclusively that the petitioners herein are not, nor is either or any of them, entitled to any relief herein.

Wherefore interveners, city of Spokane, Washington; county of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and the Spokane Jobbers' Association, of Spokane, Washington, pray that the petition herein be dismissed, and that the original petitioners herein go hence without day, without relief, and

161 that said interveners shall recover of and from said original petitioners their costs and disbursements herein.

A. M. CRAVEN,
Corporation Counsel of the City of Spokane.
JOHN WILEY,
Prosecuting Attorney of the County of Spokane.
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors and Attorneys for Interveners, City of Spokane, Washington; County of Spokane, Washington; Chamber of Commerce of Spokane, Wash.; Spokane Jobbers' Association, Wash.

162 UNITED STATES OF AMERICA,
City of Washington, District of Columbia, ss:

H. M. Stephens, being first duly sworn, upon oath deposes and says that he is one of the attorneys for the above-named interveners herein, and makes this verification for and on their behalf; that he has read the foregoing answer and knows the contents thereof; that the same is true as he verily believes; that affiant has been one of the attorneys for said interveners for more than five years last past before the Interstate Commerce Commission in the action and proceeding No. 879, and has knowledge of the matters and things alleged and set forth in the answer herein.

H. M. STEPHENS.

Subscribed and sworn to before me this 18th day of October, A. D. 1911.

[NOTARIAL SEAL.] ARTHUR J. WAND,
Notary Public, Residing in the City of Washington, District of Columbia, United States of America.

163 *Affidavit of H. M. Stephens.*

(Filed October 18, 1911.)

In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT. No. 50.

UNION PACIFIC RAILWAY COMPANY ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT. No. 51.

UNITED STATES OF AMERICA,
City of Washington, District of Columbia, ss:

H. M. Stephens, being first duly sworn, on oath deposes and
164 says that he has read the petition of the original petitioners

herein on behalf of the original petitioners herein, and has also read the affidavits in support of an application for an injunction herein; that affiant has been one of the attorneys for interveners, city of Spokane, Washington; county of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and the Spokane Jobbers' Association of Spokane, Washington, for five years last past, and has been at all the hearings by and before the Interstate Commerce Commission in action or proceeding No. 879, wherein the above-named city of Spokane, Washington; county of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and the Spokane Jobbers' Association of Spokane, Washington, were and are complainants and the Northern Pacific Railway Company et al. were and are defendants; that from his relation as such attorney he is advised and knows of the facts concerning the matters involved in this proceeding, and makes this affidavit for and on behalf of the interveners, city of Spokane, Washington; county of Spokane, Washington; Chamber of Commerce of Spokane, Washington; and Spokane Jobbers' Association of Spokane, Washington; that, in the opinion of affiant, the facts found and the decisions, conclusions, opinions, and reports made by the Interstate Commerce Commission in said case No. 879, and other cognate cases—known as the Salt Lake, Nevada, and Arizona cases—are more favorable to the defend-
165 ants in said actions (the original petitioners herein) than they should expect, and, in the opinion of affiant, are more favorable than the facts and record in said cases justify; that, as affiant understands the law and verily believes, the facts found, opinions, conclusions, decisions, and reports made by the Interstate Commerce Commission are binding upon each and all the original petitioners herein, and conclusive in all respects as to and so far as the facts involved in this action or proceeding are concerned; that the affidavits made herein for and on behalf of the original petitioners herein in support of the application for an injunction in this action, in so far as to the extent that they purport to state any matter or thing different from or beyond the findings of facts, opinions, conclusions, decisions, or reports of or by the Interstate Commerce Commission, are not warranted nor founded in fact; that all matters and things stated, covered, or referred to in the petition of the original petitioners herein, or the affidavits or any affidavit supporting an application for an injunction herein, are matters and things which were under discussion and involved, considered, and determined in the actions and proceedings before the Interstate Commerce Commission, and were and are matters and things considered, determined, and adjudicated by the Interstate Commerce Commission after full, fair, complete, and thorough hearing and due and deliberate consideration in said actions, wherein formal complaints were
166 made and issues raised by the answers of the original petitioners herein.

H. M. STEPHENS.

Subscribed and sworn to before me this — day of October, A. D. 1911.

[NOTARIAL SEAL.] ARTHUR J. WAND,
Notary Public, Residing in the City of Washington, District of Columbia, United States of America.

167 *Order permitting Chicago Association of Commerce to intervene.*

(Entered October 20, 1911.)

In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY ET AL., PETITIONERS,
v.
UNITED STATES OF AMERICA ET AL., RESPONDENTS. } No. 51.

ORDER.

On written application of the Chicago Association of Commerce, a corporation, by Cassoday, Butler, Lamb & Foster, its attorneys, leave is given the said Chicago Association of Commerce to file its intervening petition herein and to appear as an intervener and be represented by its counsel in the proceedings herein, the court reserving the right at any time hereafter, upon objection being made, or of its own motion, to revoke the right of the said Chicago Association of Commerce to appear as such intervener and be represented by its counsel in the proceedings herein if the court shall, upon such objection or on its own motion, determine that the objection is well made or that the said intervener is without right to appear and be heard.

Leave is also given the Chicago Association of Commerce to file answer within twenty (20) days.

MARTIN A. KNAPP,
Presiding Judge.

172 *Journal entry.*

Proceedings of October 20, 1911.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., PETITIONERS.
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission et al., intervening respondents. } No. 50.

UNION PACIFIC RAILROAD CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission et al., intervening respondents. } No. 51.

(Causes heard together, but not consolidated.)

Said causes came on for hearing on the petitions for preliminary injunction in Nos. 50 and 51 and on the motion of the Interstate

Commerce Commission to dismiss in No. 50, and the arguments of counsel were commenced, Mr. Charles Donnelly and Mr. F. C. Dillard appearing on behalf of the petitioners.

173 *Journal entry.*

Proceedings of October 23, 1911.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION et al., intervening respondents. } No. 50.

UNION PACIFIC RAILROAD CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION et al., intervening respondents. } No. 51.

Said causes came on for further hearing on the petitions for preliminary injunction in Nos. 50 and 51, and on the motion of the Interstate Commerce Commission to dismiss in No. 50, and the arguments of counsel were continued; Mr. F. C. Dillard appearing on behalf of the petitioners, Mr. Joseph N. Teal on behalf of the coast cities of Portland, Ore., and Seattle and Tacoma, Wash., and Mr. P. J. Farrell on behalf of the Interstate Commerce Commission.

174 *Motion of United States to dismiss.*

(Filed October 24, 1911.)

In the United States Commerce Court.

October session, 1911.

UNION PACIFIC RAILWAY COMPANY ET AL., PETITIONERS,
v.
THE UNITED STATES, RESPONDENT. } No. 51.

MOTION TO DISMISS.

In this cause the United States moves to dismiss the original petition, because:

1. Section 4 of the interstate-commerce act, as amended by the act of June 18, 1910 (36 Stat., 539, 547), is constitutional.

2. The petition upon its face shows that the Interstate Commerce Commission had jurisdiction of the subject matter involved; that in proceedings properly begun and prosecuted an investigation of the

entire subject was had by the commission; that the orders in question were based upon such proceedings and investigation; and that in promulgating said orders the commission was acting within the scope of its authority.

3. The petition fails to show that a compliance with said
175 orders, or either of them, would reduce the net earnings of petitioners, or either of them, to such an extent as to deprive them, or either of them, of their property within the meaning of the fifth amendment to the Constitution of the United States.

4. The relief sought is that an order of the Interstate Commerce Commission, promulgated under section 4 of the interstate-commerce act, be declared void, and that an injunction against the carrying into effect of said order be granted when, in the absence of an order of the commission the prohibition of said section becomes absolute, and the injunctive relief can not be granted; and, therefore, there is presented to this court only an academic question, of which it will not take jurisdiction.

5. The petition contains no equities upon its face justifying any relief sought by petitioners.

J. A. FOWLER,
Assistant to the Attorney General.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

176 *Journal entry.*

Proceedings of October 24, 1911.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION et al., intervening respondents. } No. 50.

UNION PACIFIC RAILROAD CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION et al., intervening respondents. } No. 51.

Said causes came on for further hearing on the petitions for preliminary injunction in Nos. 50 and 51 and on the motion of the Interstate Commerce Commission to dismiss in No. 50, and the arguments of counsel were continued; Mr. P. J. Farrell appearing on behalf of the Interstate Commerce Commission; Mr. James A. Fowler, on behalf of the United States; Mr. H. M. Stephens, on behalf of interveners, City of Spokane, et al.; and Mr. Byron Waters, on behalf of interveners, Interior Counties Freight Bureau of Southern California et al.

177 *Petition of intervention of the Portland Chamber of Commerce et al.*

(Filed October 25, 1911.)

In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY ET AL., petitioners, *vs.* UNITED STATES OF AMERICA, RESPONDENT.	No. 51. Petition of intervention.

PETITION OF INTERVENTION.

To the Honorable the Judges of the United States Commerce Court:

Comes now Portland Chamber of Commerce, Transportation Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club, and respectfully pray for leave to intervene in the above-entitled suit, and in support thereof allege and show:

I.

The Portland Chamber of Commerce is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the city of Portland, Oregon, and amongst other things was organized for the purpose of promoting, protecting, and developing the commercial and industrial welfare of said city of Portland and the State of Oregon.

That its membership is composed of a large number of the wholesale and retail merchants, manufacturing and financial institutions in the said city of Portland, many of whom are engaged in the transshipment of interstate freight to said city, and which will be affected by the order of the Interstate Commerce Commission referred to in the petition on file herein. The Transportation Bureau of Seattle Chamber of Commerce and Transportation Bureau of
178 Tacoma Commercial Club are and each of them is a voluntary organization, organized amongst other things for like purposes as those hereinabove set out respecting the purposes for which said Portland Chamber of Commerce was organized. The Transportation Bureau of Seattle Chamber of Commerce is located in the city of Seattle, Washington, and the Transportation Bureau of Tacoma Commercial Club is located in the city of Tacoma, Washington, and the membership of said bureaus is composed of a large number of the wholesale and retail merchants, manufacturing and financial institutions in the respective cities of Seattle and Tacoma, many of whom are engaged in the transshipment of interstate freight to said cities and which will be affected by the order of the Interstate Commerce Commission hereinabove referred to.

CLOSE IN CENTER

II.

The Portland Chamber of Commerce appeared in and participated in the hearing of case No. 879 before the Interstate Commerce Commission, said case being entitled City of Spokane et al. v. Northern Pacific Railway Company et al. In this suit the order made in said case No. 879 is directly involved.

III.

Each and all of said petitioners were intervenors in the proceedings before the Interstate Commerce Commission under the various "applications for relief under the fourth section, Nos, 205, 342, 343, 355, 349, 350, and 352," as shown by the docket of said commission, the report in which is consolidated into the commission's report in case No. 879, entitled "City of Spokane et al. v. Northern Pacific Railway Company et al.," and in case No. 2662, entitled "Commercial Club, Traffic Bureau of Salt Lake City, Utah, v. Atchison, Topeka & Santa Fe Railway Company et al." In this suit the orders made under the applications for relief under the fourth section hereinabove referred to are directly involved.

179 IV.

A great many of the members of the above-named organizations are engaged in the sale and distribution of commodities of all kinds from the said cities above named to surrounding territory and States other than those in which said cities are situated, and which in many cases are first shipped to said cities from points on Missouri River and points east thereof under the rates involved in the said proceedings before the Interstate Commerce Commission and involved in the original petition filed herein. In behalf of their members the above-named organizations and associations were and are interested in the complaints and applications before the Interstate Commerce Commission and the orders of the said commission made therein, which form the subject matter of petitioners' petition in this suit, and are interested in the construction of the said amended fourth section of the act to regulate commerce as construed and found by said Interstate Commerce Commission in their reports in the applications for relief under the fourth section hereinabove referred to, and are interested in the application of petitioner seeking to set aside said order and the true construction of said section four.

Wherefore said Portland Chamber of Commerce, Transportation Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club pray that they may be allowed to intervene herein and that they and each of them be made a party to the above-entitled suit and be allowed to file such pleadings herein as they may be advised by counsel are proper and necessary and as provided by law, and to be entitled to notice of all proceedings pertain-

ing thereto in the same manner and to the same extent as though named as parties to this suit at the time the petition was filed in this case, and to be represented by counsel as and to the extent authorized by law and the rules of equity practice and procedure in
180 this court, and for such other and further relief, general and special, in the premises as justice and equity may require.

PORTLAND CHAMBER OF COMMERCE,
By JOSEPH N. TEAL, *Its Solicitor and of Counsel.*

TRANSPORTATION BUREAU OF SEATTLE CHAMBER OF COMMERCE,
By JOSEPH N. TEAL, *Its Solicitor and of Counsel.*

TRANSPORTATION BUREAU OF TACOMA COMMERCIAL CLUB,
By JOSEPH N. TEAL, *Its Solicitor and of Counsel.*

181 UNITED STATES OF AMERICA,
City of Washington, District of Columbia, ss:

JOSEPH N. TEAL, being first duly sworn, upon oath deposes and says he is the attorney for petitioners herein and makes this certification for and on behalf of said petitioners and each of them, that affiant has personal knowledge of the facts set forth and stated in said petition and the same are true as affiant verily believes.

JOSEPH N. TEAL.

Subscribed and sworn to this twenty-fifth day of October, A. D. 1911.

MARY E. PETER,
Notary Public, residing at Washington, District of Columbia, United States of America.

[NOTARIAL SEAL.]

182 *Order allowing Portland Chamber of Commerce et al. to intervene. (Entered October 25, 1911.)*

In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY ET AL., petitioners, *vs.* UNITED STATES OF AMERICA, RESPONDENT.	No. 51.

ORDER ALLOWING INTERVENTION OF PORTLAND CHAMBER OF COMMERCE, TRANSPORTATION BUREAU OF SEATTLE CHAMBER OF COMMERCE, AND TRANSPORTATION BUREAU OF TACOMA COMMERCIAL CLUB.

The petition and application of Portland Chamber of Commerce, Transportation Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club coming on to be heard and determined by this court, said petitioners appearing by Joseph N. Teal, of counsel, and it appearing to the satisfaction of this court that the facts alleged and set forth in the petition of intervention of

the petitioners herein are sufficient to entitle said petitioners to intervene and appear herein and become parties to this action as of right and to be represented by counsel:

It is considered and ordered, that Portland Chamber of Commerce, Transportation Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club be and are and each of them is hereby allowed to appear as parties herein and hereto and to intervene in this action as of right and be represented by
183 counsel, and to take such action and part in this proceeding as they may be advised are proper and necessary, subject to the provisions of law in such cases made and provided and the rules and practice of this court and the general rules applicable to the practice and procedure of suits and proceedings in equity.

It is further ordered, on application of Portland Chamber of Commerce, Transportation Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club, by Joseph N. Teal, their counsel, leave is given the said Portland Chamber of Commerce, Transportation Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club to file their intervening petition herein and to appear as interveners and be represented by their counsel in the proceedings herein, the court reserving the right at any time hereafter, upon objection being made or of its own motion, to revoke the right of the said Portland Chamber of Commerce, Transportation Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club to appear as such interveners and be represented by their counsel in the proceedings if the court shall, upon such objection or on its own motion, determine that the objection is well taken or that the said interveners are without right to appear and be heard; leave is also given said interveners to file such plea as they may be advised to be proper or necessary within 30 days from this date.

Done in open court this twenty-fifth day of October, A. D. 1911.

MARTIN A. KNAPP,
Presiding Judge.

184 *Petition of intervention of the Giroux Consolidated Mines Company.*

(Filed October 25, 1911.)

In the Commerce Court of the United States.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, et al. *vs.* UNITED STATES OF AMERICA.	No. 50.
UNION PACIFIC RAILROAD COMPANY, OREGON WASHINGTON RAILROAD & NAVIGATION COMPANY, et al. *vs.* UNITED STATES OF AMERICA.	No. 51.

DENVER & RIO GRANDE RAILROAD COMPANY, ATCHISON, Topeka & Santa Fe Railway Company, et al.
vs.
UNITED STATES OF AMERICA. } No. 52.

To the honorable Judges of the Commerce Court of the United States:

The petition of Giroux Consolidated Mines Company, a corporation organized under the laws of the State of Delaware, respectfully shows:

First. That it is complainant in a proceeding pending before the Interstate Commerce Commission, under the style and title of Giroux Consolidated Mines Company *vs.* Nevada Northern Railway
185 Company et al., No. 3581, in which the question of rates in the territory known as "The Intermountain Territory" is involved, and on the seventh day of July, 1911, a hearing was had upon said petition, at Duluth, before a special examiner of the Interstate Commerce Commission, and it was then determined by counsel for both plaintiff and defendants, and approved by the examiner, that the questions involved in the case could not be properly heard and determined until the decision of what are known as the "intermountain cases" by the Interstate Commerce Commission, which cases were decided by the Interstate Commerce Commission in its two supplemental reports of June 22, 1911, referred to in the several bills in the above three cases, pending in this court.

Second. Your petitioner therefore shows that it is a complainant before the Interstate Commerce Commission and is interested in the above styled cases pending in this court, wherein bills have been filed attacking the orders entered by the Interstate Commerce Commission on the 22d of June, 1911, as aforesaid, and petitioner prays that it may have the right to appear in the three cases above set forth and be made a party defendant in each of said cases, and may be represented before the court by counsel.

And your petitioner will ever pray, etc.

GIROUX CONSOLIDATED MINES COMPANY,
By WM. A. GLASGOW, JR., *Counsel.*

186 *Order permitting Giroux Consolidated Mines Company et al. to intervene.*

(Entered October 25, 1911.)

In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } Suit No. 51.

Upon reading the petition of Giroux Consolidated Mines Company, to be made an intervening party respondent in the above-entitled cause,

It is ordered that the said Giroux Consolidated Mines Company be, and is hereby, made an intervening party respondent in the

above-entitled cause, with all of the rights of original respondents to appear, plead, answer, and be represented by its counsel.

For the court:

MARTIN A. KNAPP,
Presiding Judge.

In open court this twenty-fifth day of October, A. D. 1911.

187 *Journal entry.*

Proceedings of October 25, 1911.

ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION et al., intervening respondents. } No. 50.

UNION PACIFIC RAILROAD CO. ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION et al., intervening respondents. } No. 51.

Said causes came on for further hearing on the petitions for preliminary injunction in Nos. 50 and 51, and on the motion of the Interstate Commerce Commission to dismiss in No. 50, and the arguments of counsel were concluded, Mr. James A. Fowler, assistant to the Attorney General, appearing on behalf of the United States, and Mr. Robert Dunlap on behalf of the petitioners. Thereupon the causes were taken under advisement by the court.

188 *Letter from William Ellis.*

(Filed October 26, 1911.)

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.,
LEGAL DEPARTMENT,
Chicago, October 23, 1911.

(William Ellis, commerce counsel.)
CLERK OF COMMERCE COURT,
Washington, D. C.

DEAR SIR: May I ask you to withdraw my name as attorney of record in the intermountain cases which are pending in your court? As explained in a letter from Mr. Burton Hanson, general counsel of this company, I have never in any way participated in the conferences connected with these cases and have had nothing whatever to do with the drawing of the pleadings or any other proceedings in connection therewith, and it was through a misapprehension of the circumstances involved that I was put in these bills.

Very truly, yours,

WILLIAM ELLIS, *Commerce Counsel.*

189 *Answer of Chicago Association of Commerce.*

(Filed November 9, 1911.)

In the United States Commerce Court.

October term, 1911.

UNION PACIFIC RAILWAY COMPANY ET AL., Petitioners,
vs.
UNITED STATES OF AMERICA, Respondent. } No. 51.

ANSWER OF INTERVENER, CHICAGO ASSOCIATION OF COMMERCE.

Comes now the intervener, Chicago Association of Commerce, and for answer to the petition of the original petitioners herein, says:

I.

This intervener admits the allegations contained in Paragraph I of said petition.

II.

Admits the allegations contained in Paragraph II of said petition.

190 III.

Admits the allegations contained in Paragraph III of said petition.

IV.

Admits that freight carried over the lines of the petitioners has been divided or grouped into classes mentioned in Paragraph IV, and that the class rates to the Pacific coast are as therein set forth; and denies each and every other allegation in said paragraph contained.

V.

Admits that some classes of freight can be and are transported by water from points on the Atlantic coast to the Pacific coast and from points on the Atlantic coast to the Isthmuses of Tehuantepec and Panama, and thence by rail to the Pacific coast of said isthmuses, and moving thence by sailing vessels or steamships to said Pacific coast terminals of the petitioners, as alleged in said Paragraph V; and says that some classes of freight now carried all rail under class rates by petitioners do not and can not move to Pacific coast terminals by water; and denies every other allegation in said paragraph contained.

VI.

Admits that traffic moves in large volumes over the ocean to the Pacific coast ports from the Orient and other foreign countries, as alleged in Paragraph VI, and denies that the rail carriers have made exceedingly low rates as alleged.

191

VII.

Admits that the lines of railway of the petitioners converge at the points mentioned in Paragraph VII, and denies that the petitioners have made to said coast terminals less than reasonable rates for the transportation of traffic thereto, and denies every other allegation in said paragraph.

VIII.

Admits that the same rates from the Atlantic seaboard to the Pacific coast terminals have in general been applied by the petitioners to freight from all territory in the United States lying north of the Ohio River and on and east of the Missouri, as alleged in said Paragraph VIII; and admits that it is necessary, in order to afford to said interior territory a market on the Pacific coast for its merchandise, manufactures, and products which there come into competition with merchandise, manufactures, and products from the Atlantic seaboard and contiguous territory, for the petitioners to make as low rates from said interior territory to said Pacific coast terminals as the petitioners make to said terminals from the Atlantic seaboard and that lower rates should be made from said interior territory by reason of the conditions of said transportation and the economy of the shorter haul thereof.

IX.

Admits that the petitioners, at the time of the amendment of
192 the 4th section of the act to regulate commerce, had, in effect, and now have, in effect, rates from points on the Missouri River and in the vicinity thereof and from all other eastern defined territories to the Pacific coast terminals which are less than the rates from said Missouri River territory to points on their respective lines, like Spokane, Washington; Reno, Nevada; and Phoenix, Arizona; and that the difference between said rates is much greater than the several percentages from the different zones, respectively, as alleged in Paragraph IX of said petition; and denies that the rates that petitioners have made have been or are much less than reasonable rates, or much less than the value of the service rendered; and admits that there are some intermediate points to which higher than terminal rates have been made, which are situated on a single line of railway and where there are no competitive influences such as operate at the terminals, but says that there are many other intermediate points

which are situated in thickly populated districts, and where there is a great density of traffic and that much higher than terminal rates are maintained by the petitioners at these points, as well as those last above mentioned; and denies every other allegation in said paragraph contained.

X.

Admits the allegations contained in Paragraph X.

XI.

Admits that by act of Congress approved June 18, 1910, the
193 4th section of the act to regulate commerce was amended, as alleged in Paragraph XI, and admits that the petitioners made applications to the Interstate Commerce Commission for leave to continue in effect said existing lower rates for the longer haul to the Pacific coast terminals, copies of said applications being attached as exhibits to said petition and made a part thereof; and denies every other allegation in said paragraph contained.

XII.

Admits that said applications came on for hearing before said commission and that the petitioners submitted evidence in support thereof, and that thereafter said commission made its reports and entered its order, a copy of said order being set forth in paragraph XII; and denies each and every other allegation in said paragraph contained.

XIII.

Denies each and every allegation in paragraph XIII of the petition; and says that said amended 4th section is constitutional and does not purport to delegate legislative power to said commission.

XIV.

Denies each and every allegation in paragraph XIV of the petition.

XV.

Denies each and every allegation in paragraph XV of the petition.

194 XVI.

Admits that the rates now charged by the petitioners on transcontinental traffic moving to Pacific coast terminals yield to the petitioners something in excess of the out-of-pocket expenses incident to the handling of the traffic moving under said rates and contributes

something to the return which the petitioners are entitled to earn upon their properties, as alleged in paragraph XVI contained; and denies every other allegation in said paragraph XVI contained.

XVII.

Denies each and every allegation in paragraph XVII of said petition contained.

XVIII.

Denies each and every allegation contained in paragraph XVIII of said petition, except that this intervener admits that the petitioners will be obliged to adjust many of their rates now in effect from Missouri River territory and all points east thereof in order to comply with the order of the commission.

XIX.

Admits that if not enjoined, the order made by the commission will on the 15th day of November, 1911, become effective and remain in force for two years thereafter as alleged in paragraph XIX of the petition, and that the petitioners will have to adjust their
195 tariffs and make their charges in accordance with said order; and denies each and every other allegation contained in said paragraph.

All of which matters and things this intervener is ready to aver, maintain, and prove as this honorable court may direct, and prays that the petition herein may be dismissed and that this intervener may recover of and from said original petitioners its costs and charges herein.

CASSODAY, BUTLER, LAMB & FOSTER,
Attorneys for Intervener.

RUSH C. BUTLER,
WILLIAM E. LAMB,
STEPHEN A. FOSTER,
CORNELIUS LYNDE,
Of Counsel.

STATE OF ILLINOIS, *County of Cook, ss:*

Stephen A. Foster, being first duly sworn, upon oath deposes and says that he is one of the attorneys of the above named intervener and makes this verification for and on its behalf; that he has read the foregoing answer and knows the contents thereof; that the same is true as he verily believes.

STEPHEN A. FOSTER.

Subscribed and sworn to before me this 7th day of November, A. D. 1911.

EDWIN J. NERGARD,
Notary Public.

[SEAL.]

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196 *Order granting preliminary injunction and denying motion to dismiss.*

Entered November 9, 1911.

In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } No. 51.

October term, 1911.

This cause coming on to be heard on motion for preliminary injunction suspending the order of the Interstate Commerce Commission made June 22, 1911, on complaint of the city of Spokane and others against the Northern Pacific Railway Company and others, the said order being as set forth in the petition herein; and the said motion having been argued by counsel, Charles Donnelly, F. C. Dillard, and Robert Dunlap for the petitioners; Joseph N. Teal for the city of Portland and other coast cities; P. J. Farrell for the Interstate Commerce Commission; H. M. Stephens for city of Spokane and others, and Byron Waters for the Interior Counties Freight Bureau of Southern California and others, intervening on that behalf; and J. A. Fowler, Assistant to the Attorney General for the United States; upon due consideration thereof and of the bill, affidavits, and answers, it is thereupon ordered and adjudged that a preliminary injunction issue as prayed for, and that the order of the said the Interstate Commerce Commission be suspended and enjoined until the further order of the court.

The motion to dismiss is denied.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

NOVEMBER 9, 1911.

223 *Assignment of errors.*

Filed November 21, 1911.

In the United States Commerce Court.

October term, 1911.

UNION PACIFIC RAILROAD COMPANY AND TEN OTHER railroad companies, petitioners; and Portland Chamber of Commerce, a corporation; the Transportation Bureau of Seattle Chamber of Commerce, an association; and Transportation Bureau of Tacoma Commercial Club, an association, interveners,
v.
THE UNITED STATES OF AMERICA, RESPONDENT, AND Seven Interveners. } No. 51.

ASSIGNMENT OF ERRORS.

Come now the United States of America, respondent; Interstate Commerce Commission; Chicago Association of Commerce; city of

CLOSE IN CENTER

Spokane, Washington, and county of Spokane, Washington; Chamber of Commerce of Spokane, Washington; Spokane Jobbers' Association of Spokane, Washington; and Giroux Consolidated Mines Company, by their respective counsel, and in connection with their application for appeal, file the following assignment of errors on which they will rely upon said appeal to the Supreme Court of the United States from the interlocutory order or decree of the Com-

The Commerce Court erred:

224

I.

In granting the preliminary injunction enjoining the order of the Interstate Commerce Commission, entered June 22, 1911, on complaint of the city of Spokane and others against Northern Pacific Railway Company and others, and suspending the force and effect of the same, for that the petition of the petitioners and the affidavits in support of the same, (a) do not set forth any cause of action and are insufficient to warrant the granting of the preliminary injunction or to form the basis for any relief from the said order; (b) nor have the said petitioners shown that there is any equity in the said petition upon which to grant the preliminary injunction or to form the basis for any relief from the said order; (c) nor have the petitioners shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce; (d) nor have the petitioners shown that in making its said order the Interstate Commerce Commission violated any right of the said petitioners protected by the Constitution of the United States, or any other right of the said petitioners over which this court may exercise jurisdiction.

II.

In holding that section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," approved June 18, 1910, when properly construed, does not authorize the division of the United States into the five zones prescribed and adopted by the Interstate Commerce Commission as a basis upon which

225 to make and prescribe rates, fares, and charges of common carriers under said section 4, and that the same was beyond the power of the Interstate Commerce Commission.

III.

In holding that said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as

amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed does not authorize the percentage bases prescribed and adopted by the Interstate Commerce Commission for the purpose of making and prescribing the rates, fares, and charges of common carriers under said section 4, and that the same was beyond the power of the Interstate Commerce Commission.

IV.

In holding that said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed does not authorize the division of the United States into the five zones prescribed and adopted by the Interstate Commerce Commission and the percentage bases prescribed and adopted by the Interstate Commerce Commission, and the making of rates, fares, and charges from the said zones on the said percentage bases, and that in adopting such a method of making and prescribing rates, fares, and charges of common carriers under said section 4, the Interstate Commerce Commission acted beyond its power and authority.

V.

In holding that if the said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4,
226 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed, authorizes the percentage bases prescribed and adopted by the Interstate Commerce Commission for the purpose of making rates, fares, and charges of common carriers under said section 4, that the said section 4, as so construed, is beyond the power of Congress to enact and is unconstitutional and void.

VI.

In holding that if the said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed, authorizes the Interstate Commerce Commission to divide the United States into the five zones prescribed and adopted by the said commission and to make rates, fares, and charges from the said five zones on the percentage bases adopted by the Interstate Commerce Commission, that said section 4, as so construed, is beyond the power of Congress to enact and is unconstitutional and void.

VII.

In granting the preliminary injunction enjoining the said order of the Interstate Commerce Commission entered June 22, 1911, and suspending the force and effect of the same, for that the Interstate Commerce Commission in making and entering the said order did proceed in all respects in accordance with the statute in such case made and provided and after a full hearing, and that in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion together with its decision, order or requirement in the premises, and by
227 virtue of its authority in that behalf, it prescribed the extent to which the petitioners may be relieved from the operation of said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910; all of which were matters and things within the power of the said Interstate Commerce Commission to hear and determine, and its report and order are conclusive upon the court and the matters and things alleged in the petition and the affidavits in support of the same are insufficient to disturb the said order.

VIII.

In granting the preliminary injunction, for that even though the said order of June 22, 1911, is null and void as beyond the power and authority of the Interstate Commerce Commission, nevertheless, in granting the preliminary injunction, in the manner and form in which the same was granted, the Commerce Court suspended and annulled the provisions of said section 4 of the act of Congress entitled "An act to regulate commerce," etc , approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, and continued in force and effect the rates, fares, and charges then existing, whereas when the said order of June 22, 1911, was entered the application filed before the commission had been determined within the meaning of the second proviso of said section 4, and either said order thereupon became effective or the requirement of the statute that petitioners shall not charge more for a shorter than for a longer haul became absolute, and said statutory requirement is not subject to the injunctive power of the court.

IX.

In denying the separate motions of the United States and the Interstate Commerce Commission to dismiss the petition.

Wherefore, the United States and the said intervenors pray that the said interlocutory order or decree of the Commerce Court,
228 entered November 9, 1911, be reversed, annulled, and set aside.

and that the petition be dismissed, and for such other and further order as may be appropriate.

GEO. W. WICKERSHAM,
Attorney General of the United States.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.
CASSODAY, BUTLER, LAMB & FOSTER,
Solicitors for Chicago Association of Commerce.
A. M. CRAVEN,
JOHN WILEY,
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors for City of Spokane, Washington; for County of Spokane, Washington; for Chamber of Commerce of Spokane, Washington; and for Spokane Jobbers' Association of Spokane, Washington.
WILLIAM A. GLASGOW, Jr.,
Solicitor for Giroux Consolidated Mines Company.

229 *Petition for appeal.*

(Filed November 21, 1911.)

In the United States Commerce Court.

October term, 1911.

UNION PACIFIC RAILROAD COMPANY AND TEN OTHER RAILROAD COMPANIES, petitioners; and Portland Chamber of Commerce, a corporation; the Transportation Bureau of Seattle Chamber of Commerce, an association; and Transportation Bureau of Tacoma Commercial Club, an association, interveners,

v.

THE UNITED STATES OF AMERICA, RESPONDENT, AND SEVEN interveners.

No. 51.

PETITION FOR APPEAL.

The United States of America, respondent; Interstate Commerce Commission; Chicago Association of Commerce, a corporation; city of Spokane, Washington, and county of Spokane, Washington, municipal corporations; Chamber of Commerce of Spokane, Washington, a corporation; Spokane Jobbers' Association of Spokane, Washington, an association; and Giroux Consolidated Mines Company, a corporation, interveners, feeling themselves aggrieved by the interlocutory order or decree of the Commerce Court, entered November 9, 1911, granting a preliminary injunction suspending and enjoining the order of the Interstate Commerce Commission until the further order of the court, by their respective counsel, pray an appeal to the Supreme Court of the United States, in accordance with section 2 of an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910.

The particulars wherein the United States and the said interveners consider said order or decree erroneous are set forth in the
230 assignment of errors on file, to which reference is made.

And the United States and the said interveners further pray that a transcript of the record, proceedings, and papers on which the said order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

GEO. W. WICKERSHAM,
Attorney-General of the United States.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

CASSODAY, BUTLER, LAMB & FOSTER,
Solicitors for Chicago Association of Commerce.

A. M. CRAVEN,
JOHN WILEY,
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors for city of Spokane, Washington, for county of Spokane, Washington, for Chamber of Commerce of Spokane, Washington, and for Spokane Jobbers' Association of Spokane, Washington.

WILLIAM A. GLASGOW, Jr.,
Solicitor for Giroux Consolidated Mines Company.

Allowed:

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court in said cause.

231 *Order allowing appeal.*

(Entered November 21, 1911.)

In the United States Commerce Court.

October Term, 1911.

UNION PACIFIC RAILROAD COMPANY AND TEN OTHER RAILROAD COMPANIES, petitioners; and Portland Chamber of Commerce, a corporation; the Transportation Bureau of Seattle Chamber of Commerce, an association; and Transportation Bureau of Tacoma Commercial Club, an association, interveners, } No. 31.

v.

THE UNITED STATES OF AMERICA, RESPONDENT, AND SEVEN INTERVENERS.

ORDER ALLOWING APPEAL.

In the above-entitled cause, the United States of America; Interstate Commerce Commission; Chicago Association of Commerce; City of Spokane, Washington, and County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; Spokane Jobbers' Association of Spokane, Washington; and Giroux Consolidated Mines Company, having made and filed their petition praying an

appeal to the Supreme Court of the United States from the interlocutory order or decree of the Commerce Court entered November 9, 1911, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided—

It is ordered and decreed, that the said appeal be, and the same is hereby, allowed as prayed and made returnable on the 21st day of December, A. D. 1911; and the clerk is directed to *to* transmit forthwith a properly authenticated transcript of the record, papers, and proceedings to the Supreme Court of the United States.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court in said cause.

282 *Docket entries.*

United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE Commerce Commission; City of Spokane et al.; Chicago Association of Commerce; Giroux Consolidated Mines Company, interveners. } No. 51.

Attorneys: N. H. Loomis, H. A. Scandrett, F. C. Dillard, W. W. Cotton, P. L. Williams. C. W. Bunn, Chas. Donnelly, R. A. Jackson, E. C. Lindley, C. M. Dawes, R. B. Scott, E. M. Hyzer, C. C. Wright, Burton Hanson, A. H. Bright, for petitioners; James A. Fowler, Blackburn Esterline, for United States; P. J. Farrell, for Interstate Commerce Commission; J. B. Campbell, H. M. Stephens, Rush C. Butler, Wm. E. Lamb, Stephen A. Foster, Cornelius Lynde, Joseph N. Teal, Wm. A. Glasgow, jr., for interveners.

PROCEEDINGS.

1911.
Oct. 4. Petition filed.
Oct. 4. Affidavits of J. C. Stubbs, H. E. D. Jackson, James G. Woodworth, G. W. Luce, F. H. Plaisted, J. A. Munroe, William Richards, Frederick H. Parker filed.
Oct. 4. Motion for restraining order filed.
Oct. 4. Acceptance on behalf of U. S. and I. C. C. of service of notice of hearing on application for temporary injunction filed.
Oct. 5. Copy of petition filed with chairman of I. C. C. and *and* in the Department of Justice.
Oct. 7. Appearance of I. C. C. as party respondent and P. J. Farrell as solicitor filed.
Oct. 14. Answer of Interstate Commerce Commission filed.
Oct. 16. Intervention petition of city of Spokane et al. filed.
Oct. 16. Affidavits of E. P. Ripley and James Peabody filed.
Oct. 17. Petition of Intervention of Chicago Association of Commerce filed.
Oct. 18. Order entered granting city of Spokane et al. leave to intervene.
Oct. 18. Answer of interveners city of Spokane et al. filed.
Oct. 18. Affidavit of H. M. Stephens filed.
Oct. 20. Order entered granting Chicago Association of Commerce leave to intervene.
Oct. 20. Affidavits of C. J. McNitt and R. Blaisdell filed.
283 Oct. 24. Motion of the United States to dismiss filed.

Oct. 25. Petition of intervention of Giroux Consolidated Mines Co. filed in No. 50.
Oct. 25. Petition of intervention of Portland Chamber of Commerce et al. filed.
Oct. 25. Order entered granting Portland Chamber of Commerce et al. leave to intervene.
Oct. 25. Order entered granting Giroux Consolidated Mines Company leave to intervene.
Oct. 26. Letter from William Ellis requesting withdrawal of name as attorney filed.
Nov. 9. Answer of intervener, Chicago Association of Commerce, filed.
Nov. 9. Order entered granting application for preliminary injunction and denying motion to dismiss.
Nov. 14. Opinion filed.
Nov. 21. Motion for final decree filed.
Nov. 21. Order assigning case for hearing on motion for final decree filed.
Nov. 21. Assignment of errors filed.
Nov. 21. Petition for appeal filed.
Nov. 21. Order allowing appeal filed.

234 In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION, City of Spokane et al., Chicago Association of Commerce, Portland Chamber of Commerce et al., Giroux Consolidated Mines Company, interveners. } No. 51.

UNITED STATES OF AMERICA, *ss:*

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 233, inclusive) to be a true and complete transcript of the proceedings had of record in the above-entitled cause, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 2d day of December, A. D. 1911.

[SEAL.] G. F. SNYDER, *Clerk.*

235 *Citation on appeal.*

UNITED STATES OF AMERICA, *ss:*

To Union Pacific Railroad Company; Oregon-Washington Railroad & Navigation Company; Oregon Short Line Railroad Company; Northern Pacific Railway Company; Great Northern Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & North Western Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Puget Sound Railway Company; Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Portland Chamber of Commerce, a corporation; The Transportation Bureau of Seattle Chamber of Commerce, an association; Transportation Bureau of Tacoma Commercial Club, an association.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty

days from the date hereof, pursuant to an appeal duly allowed and filed in the clerk's office of the United States Commerce Court wherein the United States of America; Interstate Commerce Commission; Chicago Association of Commerce, a corporation; City of Spokane, Washington, and County of Spokane, Washington, municipal corporations; Chamber of Commerce of Spokane, Washington, a corporation; Spokane Jobbers' Association of Spokane, Washington, an association; and Giroux Consolidated Mines Company, an association, are appellants and you are appellees, to show cause, if any there be, why the interlocutory order or decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Martin A. Knapp, presiding judge of the United States Commerce Court, this twenty-first day
236 of November, in the year of our Lord, nineteen hundred and eleven.

MARTIN A. KNAPP,

Presiding Judge of the United States Commerce Court.

Service of a copy of the within citation is hereby admitted this 25th day of Nov., A. D. 1911.

ROBERT DUNLAP,
F. C. DILLARD,
CHAS. DONNELLY,
Solicitors for Union Pacific Railroad Company and Ten Other Railroad Companies, Appellees.

JOSEPH N. TEAL,
Solicitor for Portland Chamber of Commerce, Transportation Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club, Appellees.

237 (Indorsed:) Citation on appeal. Union Pacific Railroad Company et al. *v.* United States. No. 51.

238 In the Supreme Court of the United States.

October term, 1911.

UNITED STATES OF AMERICA AND OTHERS, APPELLANTS,
v.
UNION PACIFIC RAILROAD COMPANY AND OTHERS, APPELLEES. } No. 884.

Stipulation.

It is hereby stipulated and agreed, by and between the parties to the above-entitled cause, by their respective counsel, that the following matter, viz, affidavits of Stubbs, Jackson, Woodworth, Luce, Plaisted, Munroe, Richards, and Parker; affidavits of Ripley and Peabody, and map; affidavits of McNitt and Blaisdell; opinion of the Commerce Court, filed November 14, 1911, is contained in the

record in United States of America et al. *v.* Atchison, Topeka & Santa Fe Railway Company et al., No. 883, Supreme Court, October term, 1911, and need not be reprinted in the record in the above-entitled cause; but that upon the hearing of the above-entitled cause, the court and the counsel may refer to the same as printed in the record in No. 883 to all intents and purposes as though printed in the record herein.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General, for the United States.

RUSH BUTLER and
CASSODAY, BUTLER, LAMB & FOSTER,
Solicitors for Chicago Association of Commerce.

WILLIAM A. GLASGOW, JR.,
Solicitor for Giroux Consolidated Mines Company.

J. N. TEAL,
By F. C. DILLARD,
Solicitor for petitioning interveners, Portland Chamber of Commerce, Trans. Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

A. M. CRAVEN,
JOHN HILEY,
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors for city of Spokane, Washington; for county of Spokane, Washington; for Chamber of Commerce of Spokane, Washington; and for Spokane Jobbers' Association of Spokane, Washington.

F. C. DILLARD,
ROBERT DUNLAP,
CHARLES R. DONNELLY,
E. C. DONNELLY,
For all Appellees.

239 (Indorsed:) File No. 22960. Supreme Court U. S. October term 1911. Term No. 884. The United States of America et al., appellants, vs. Union Pacific Railroad Company et al. Stipulation as to printing record. Filed January 4, 1912.

(Indorsement on cover:) File No. 22960. United States Commerce Court. Term No. 884. The United States of America, Interstate Commerce Commission et al., appellants, vs. Union Pacific Railroad Company et al. Filed December 8th, 1911. File No. 22960.

○

3

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]-1913

No. [redacted] 162

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

FILED JANUARY 10, 1913.

(23004)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 928.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

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2 United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; UNION Pacific Railroad Company; Oregon Short Line Railroad Company; Oregon-Washington Railroad & Navigation Company; Southern Pacific Company; Northern Pacific Railway Company; Great Northern Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & North Western Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Puget Sound Railway Company; Denver & Rio Grande Railroad Company; Missouri Pacific Railway Company; Western Pacific Railway Company; San Pedro, Los Angeles & Salt Lake Railroad Company; Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company, petitioners.

vs.

UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission, city of Spokane et al., Chicago Association of Commerce, Interior Counties Freight Bureau of Southern California et al., Giroux Consolidated Mines Company, interveners.

} No. 50.

UNITED STATES OF AMERICA, *ss:*

Be it remembered, that in the United States Commerce Court, in the city of Washington, District of Columbia, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

243 *Notice of United States and Interstate Commerce Commission.*

(Filed November 21, 1911.)

In the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al., petitioners,

v.

UNITED STATES OF AMERICA, RESPONDENT, AND Interstate Commerce Commission et al., intervening respondents.

} In Equity. No. 50.

MOTION.

Come now the United States, respondent, and the Interstate Commerce Commission, intervening respondent, in the above-entitled case, and inform the court that they elect to stand upon their respective motions to dismiss.

J. A. FOWLER,
Assistant to the Attorney General.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General,
For United States.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

244 *Order setting cause for further hearing.*

(Entered November 21, 1911.)

United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. et al., petitioners,
vs.
THE UNITED STATES, RESPONDENT, AND THE Interstate Commerce Commission et al., intervening respondents. } No. 50.

In the matter of motion of the United States and the Interstate Commerce Commission for final decree.

Upon consideration of a motion filed by the United States and the Interstate Commerce Commission in the above-entitled case, on November 21, 1911, a copy of which is hereto attached.

It is ordered that said case be assigned for consideration of said motion at the court room of this court, in Washington, D. C., on December 5, 1911, at 10.30 a. m.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

245 *Motion of Chicago Association of Commerce to dismiss.*

(Filed December 5, 1911.)

In the United States Commerce Court.

November term, A. D. 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al., petitioners,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } No. 50.

MOTION TO DISMISS, BY CHICAGO ASSOCIATION OF COMMERCE, ONE OF THE INTERVENERS.

Now comes the Chicago Association of Commerce, one of the interveners, and moves to dismiss the original petition herein and to vacate the temporary injunction heretofore entered for lack of jurisdiction in this honorable court to entertain said original petition:

Because this court has only such jurisdiction to set aside the orders of the Interstate Commerce Commission as was possessed by the Circuit Courts of the United States prior to June 18, 1910;

Because the Circuit Courts of the United States prior to June 18, 1910, had no jurisdiction to enjoin orders of the commission entered on applications filed solely under and by virtue of the amend-
246 ment of June 18, 1910, to section 4 of the act to regulate commerce; and

Because the applications filed and the proceedings had before the Interstate Commerce Commission upon which were entered the orders sought to be enjoined in the above-entitled cause were entertained by said commission solely under and by virtue of said amendment of June 18, 1910;

And for further ground of this motion, shows that even if it be assumed that this court would ordinarily have jurisdiction over orders of the commission entered under the amendment of June 18, 1910, to the fourth section, still this court does not have jurisdiction over the order here complained of:

Because of this court is correct in holding that the proviso in section 4 as amended imposed upon the commission the duty not only to grant exemption from the hard and fast rule of this section, but also at one and the same time to fix the reasonable maximum rates involved in the application by the carriers, it would necessarily follow that the commission in this case failed in the performance *ance* of its plain duty, and the remedy for the carriers would be by writ of mandamus in the Supreme Court of the District of Columbia.

CASSODAY, BUTLER, LAMB & FOSTER,
Attorneys for Intervener.

RUSH C. BUTLER,
WILLIAM E. LAMB,
STEPHEN A. FOSTER,
CORNELIUS LYNDE,
Of Counsel.

247 *Motion to set time for taking of evidence.*

(Filed December 6, 1911.)

Before the United States Commerce Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al. *vs.* UNITED STATES OF AMERICA ET AL.	In Equity. No. 50.

Comes now Western Pacific Railway Company, by its solicitors, F. W. M. Cutcheon and James C. Jeffery, and asks this honorable court to set a time for the taking of evidence on behalf of this petitioner prior to the entering by this honorable court of its final decree herein.

WESTERN PACIFIC RAILWAY COMPANY,
By F. W. M. CUTCHEON,
JAMES C. JEFFERY.

248 *Final decree.*

(Entered December 9, 1911)

In the United States Commerce Court.

December session, 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; UNION Pacific Railroad Company; Oregon Short Line Railroad Company; Oregon-Washington Railroad & Navigation Company; Southern Pacific Company; Northern Pacific Railway Company; Great Northern Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & North Western Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Puget Sound Railway Company; Denver & Rio Grande Railroad Company; Missouri Pacific Railway Company; Western Pacific Railway Company; San Pedro, Los Angeles & Salt Lake Railroad Company; Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company, petitioners,

v.

UNITED STATES OF AMERICA, RESPONDENT.

No. 50.

On this day this cause came on further to be heard. Where-
249 upon came petitioners, also came the United States of America, respondent, the Interstate Commerce Commission, intervening respondent. Also appear the intervenors, the City of Spokane, Washington, the County of Spokane, Washington, the Chamber of Commerce of Spokane, Washington, the Spokane Jobbers' Association, of Spokane, Washington, and pray the court to be permitted to withdraw their answer herein and to join in each of the separate motions of the United States and the Interstate Commerce Commission to dismiss the cause; also appear the Interior Counties Freight Bureau of Southern California and the Maricopa County Commercial Club, of Phoenix, Arizona, and waive their right to plead or answer herein, and pray leave to join in said motions to dismiss this cause; also appears the Chicago Association of Commerce and asks leave to withdraw its answer herein filed, and thereupon with permission of the court files a motion to dismiss this cause, and also asks leave to join in the motions of the United States and the Interstate Commerce Commission to dismiss this cause; also appears the Giroux Consolidated Mines Company and waives its right to plead or answer herein, and joins in said motions of the United States and the Interstate Commerce Commission to dismiss this cause; also appears the Western Pacific Railway Company, petitioner, and in its own behalf files a motion praying the court, before entering final
250 judgment, to set the case down for hearing and to permit it to introduce evidence in support of the petition.

Whereupon the matters and things for consideration are argued by Blackburn Esterline and J. A. Fowler, solicitors for the United States of America, and by P. J. Farrell, solicitor for the Interstate Commerce Commission, and by W. E. Lamb, solicitor for the Chicago Association of Commerce, and by F. C. Dillard, solicitor for petitioners, and James C. Jeffery, solicitor for the Western Pacific Railway Company, and Stephen A. Foster, solicitor for the Chicago Association of Commerce;

Thereupon, upon consideration, the court doth order, adjudge, and decree as follows:

First. The waiver of intervenors as above shown of their right to plead or answer herein is recognized and allowed, and their prayer to join in the above-shown motions to dismiss the cause is granted; and the prayer of intervenors or respondents as above shown who have answered, to withdraw their answers herein filed is granted, and their prayer to join in the motions to dismiss this cause is likewise granted.

Second. The motion of the Chicago Association of Commerce to dismiss this cause is denied.

Third. The motions of the United States of America and of the Interstate Commerce Commission and of the intervening respondents to dismiss this cause are denied.

251 Fourth. The motion of the Western Pacific Railway Company is denied.

Fifth. Whereupon said respondent, the United States of America, and intervening respondent, the Interstate Commerce Commission, and other intervenors herein, declining to further plead or answer herein, and electing to stand upon their motions to dismiss this cause, and it appearing that due and proper notice has been given to all the parties of this hearing, the court doth proceed to enter final decree and for the reasons stated in the opinion of the court filed on the 14th day of November, 1911, doth order, adjudge, and decree as follows:

(a) That the equities of this cause are with petitioners and they are entitled to relief as hereinafter granted;

(b) That the order of the Interstate Commerce Commission sought to be enjoined in this cause, to wit, the order entered by them on the thirty-first day of July, 1911, known as fourth section order No. 124, passing on the applications Nos. 205, 342, 343, 344, 349, 350, and 352, on behalf of the Transcontinental Freight Bureau, by R. H. Countiss, agent, for relief from the provisions of the fourth section of the act to regulate commerce as amended June 18, 1910, with respect to rates made from eastern points of shipment, which are higher to intermediate points than to Pacific coast terminals, is invalid;

252 (c) That said order be, and the same hereby is, set aside and held for naught, and said applications are declared to be pending before the Interstate Commerce Commission as if said order had not been entered;

(d) That the temporary injunction heretofore granted by this court on the ninth day of November, 1911, is hereby made permanent; and that the United States of America, the Interstate Commerce Commission, and their members, agents, officers, servants, and representatives be, and they hereby are, forever enjoined from enforcing or taking any steps to enforce said order of July thirty-first, 1911, or from instituting any proceedings for the enforcement thereof, or from endeavoring to recover any penalties by reason of disobedience to said order, or from prosecuting or seeking to prosecute by indictment, complaint, or otherwise, any of the petitioners for disobedience to said order; or for a failure to comply with the fourth section of the act to regulate interstate commerce as amended on the 18th day of June, 1910, relative to charging a greater rate for the shorter haul included within the longer than the longer on the matters covered by said applications pending before the Interstate Commerce Commission until said applications shall have been finally disposed of in accordance with the opinion and decree of this court.

253 Sixth. That a certified copy of this order be served upon the Attorney General of the United States and the chairman of the Interstate Commerce Commission.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

To all of which things the respondent and intervenors object and except, except as to the denial of the motion of the Western Pacific Railway Company, to which the said Western Pacific Railway Company does object and except.

254 DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 11th day of December, 1911, I served the within final decree in case No. 50 on the Interstate Commerce Commission by leaving a copy thereof with Judson C. Clements, its chairman.

December 11, 1911.

F. J. STAREK, *Marshal.*
By JAMES L. MURPHY, *Deputy.*

Copy handed to—
J. H. HOWELL.

DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 11th day of December, 1911, I served the within final decree in case No. 50 on the Attorney General by leaving a copy thereof with Blackburn Esterline, his designated agent.

December 11, 1911.

F. J. STAREK, *Marshal.*
By JAMES L. MURPHY, *Deputy.*

255 *Petition for appeal.*

(Filed December 20, 1911.)

In the United States Commerce Court.

December session, 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND sixteen other railroad companies, petitioners.
v.
THE UNITED STATES OF AMERICA, RESPONDENT, AND NINE intervening respondents.
No. 50.

PETITION FOR APPEAL.

The United States of America, respondent; Interstate Commerce Commission; Chicago Association of Commerce, a corporation; City of Spokane, Washington, and County of Spokane, Washington, municipal corporations; Chamber of Commerce of Spokane, Washington, a corporation; Spokane Jobber's Association of Spokane, Washington, an association; Interior Counties Freight Bureau of Southern California, an association; Maricopa County Commercial Club of Phoenix, Arizona, an association; and Giroux Consolidated Mines Company, a corporation, intervening respondents, feeling themselves aggrieved by the final order or decree of the Commerce Court, entered December 9, 1911, by their respective counsel, pray an appeal to the Supreme Court of the United States from the said final order or decree, excepting the part thereof denying the separate motion of Western Pacific Railway Company.

The particulars wherein the United States and the said interveners consider said final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

256 And the United States and the said interveners further pray that a transcript of the record, proceedings, and papers on which the said order or decree was made and entered, duly authen-

ticated, may be transmitted forthwith to the Supreme Court of the United States.

GEO. W. WICKERSHAM,
Attorney General of the United States.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.
CASSODAY, BUTLER, LAMB AND FOSTER,
Solicitors for Chicago Association of Commerce.
A. M. CRAVEN,
JOHN WILEY,
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors for City of Spokane, Washington; for County of Spokane, Washington; for Chamber of Commerce of Spokane, Washington; and for Spokane Jobbers' Association of Spokane, Washington.
BYRON WATERS,
Solicitor for Interior Counties Freight Bureau of Southern California and for Maricopa County Commercial Club of Phoenix, Arizona.
WILLIAM A. GLASGOW, JR.,
Solicitor for Giroux Consolidated Mines Company.

Allowed:

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court.

257 *Assignment of errors.*

(Filed December 20, 1911.)

In the United States Commerce Court.

October session, 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND sixteen other railroad companies, petitioners,
v.
THE UNITED STATES OF AMERICA, RESPONDENT, AND NINE INTERVENING respondents.
} No. 50.

ASSIGNMENT OF ERRORS.

Come now The United States of America, respondent; and Interstate Commerce Commission; Chicago Association of Commerce; City of Spokane, Washington, and County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; Spokane Jobbers' Association of Spokane, Washington; Interior Counties Freight

Bureau of Southern California; Maricopa County Commercial Club of Phoenix, Arizona, and Giroux Consolidated Mines Company, intervening respondents, by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely upon said appeal to the Supreme Court of the United States from the final order or decree of the Commerce Court entered against them December 9, 1911, in the above-entitled cause.

The Commerce Court erred:

I.

In denying the separate motion of the United States to dismiss the petition.

II.

In denying the separate motion of the Interstate Commerce Commission to dismiss the petition.

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III.

In denying the separate motion of the Chicago Association of Commerce to dismiss the petition.

IV.

In making permanent the preliminary injunction granted November 9, 1911, and in permanently enjoining the order of the Interstate Commerce Commission, entered July 31, 1911, passing upon applications Nos. 205, 342, 343, 344, 349, 350, and 352, on behalf of the Transcontinental Freight Bureau for relief from the provisions of the fourth section of the act to regulate commerce, as amended June 18, 1910, and declaring invalid the same, for that the petition (a), does not set forth any cause of action and is insufficient to warrant the granting of the injunction or to form the basis for any relief from the said order; (b) nor have the said petitioners shown that there is any equity in the said petition upon which to grant the injunction or to form the basis for any relief from the said order; (c) nor have the petitioners shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce; (d) nor have the petitioners shown that in making its said order the Interstate Commerce Commission violated any right of the said petitioners protected by the Constitution of the United States or any other right of the said petitioners over which the court may exercise jurisdiction.

V.

259 In holding that the action of the Interstate Commerce Commission had and taken July 31, 1911, in passing upon application numbers 205, 342, 343, 344, 349, 350, and 352, on behalf of the Transcontinental Freight Bureau for relief from the provisions of said section 4, is an order of the Interstate Commerce Commission within the meaning of section 1 of an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, which provides that the Commerce Court shall have jurisdiction in all cases "brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

VI.

In holding that section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," approved June 18, 1910, when properly construed, does not authorize the division of the United States into the five zones prescribed and adopted by the Interstate Commerce Commission as a basis upon which to make and prescribe rates, fares and charges of common carriers under said section 4 and that the same was beyond the power of the Interstate Commerce Commission.

VII.

In holding that said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed does not authorize the percentage bases prescribed and adopted by the Interstate Commerce Commission for the purpose of making and prescribing the rates, fares and charges of common carriers under
260 said section 4 and that the same was beyond the power of the Interstate Commerce Commission.

VIII.

In holding that said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed does not authorize the division of the United States into the five zones prescribed and adopted by the Interstate Commerce Commission and the percentage bases prescribed and adopted by the Interstate Commerce Commission, and the making of rates, fares, and charges from the said zones on the said percentage bases, and that in adopting

such a method of making and prescribing rates, fares, and charges of common carriers under said section 4 the Interstate Commerce Commission acted beyond its power and authority.

IX.

In holding that if the said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed authorizes the percentage bases prescribed and adopted by the Interstate Commerce Commission for the purpose of making rates, fares, and charges of common carriers under said section 4, that the said section 4, as so construed, is beyond the power of Congress to enact and is unconstitutional and void.

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X.

In holding that if the said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed authorizes the Interstate Commerce Commission to divide the United States into the five zones prescribed and adopted by the said commission and to make rates, fares, and charges from the said five zones on the percentage bases adopted by the Interstate Commerce Commission, that said section 4, as so construed, is beyond the power of Congress to enact and is unconstitutional and void.

XI.

In making permanent the preliminary injunction granted November 9, 1911, and in permanently enjoining the said order of the Interstate Commerce Commission entered July 31, 1911, and declaring invalid the same, for that the Interstate Commerce Commission in making and entering the said order did proceed in all respects in accordance with the statute in such case made and provided, and after a full hearing, and by virtue of its authority in that behalf, did prescribe the extent to which the petitioners may be relieved from the operation of said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910.

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XII.

In making permanent the preliminary injunction and permanently enjoining the said order of July 31, 1911, for that, even though the

said order is null and void as beyond the power and authority of the Interstate Commerce Commission, nevertheless, in granting the injunction, in the manner and form in which the same was granted, the Commerce Court suspended and annulled the provisions of said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, and continued in force and effect the rates, fares, and charges then existing, whereas when the said order of July 31, 1911, was entered the applications filed before the commission had been determined within the meaning of the second proviso of said section 4, and either said order thereupon became effective or the requirement of the statute that petitioners shall not charge more for a shorter than for a longer haul became absolute, and said statutory requirement is not subject to the injunctive power of the court.

XIII.

In declaring that applications Nos. 205, 342, 343, 344, 349, 350, and 352 on behalf of the Transcontinental Freight Bureau,
263 by R. H. Countiss, agent, for relief from the provisions of the fourth section of the act to regulate commerce as amended June 18, 1910, with respect to rates made from eastern points of shipment which are higher to intermediate points than to Pacific coast terminals, are pending before the Interstate Commerce Commission as if said order of date July 31, 1911, had not been entered, after setting aside and holding for naught the said order, for that the commerce court is not a court of appeal with power to review and remand the case to the Interstate Commerce Commission with directions to proceed in accordance with its opinion and decree, but a court of original jurisdiction, limited to the power to enjoin, annul, or suspend only.

XIV.

In forever enjoining the United States of America, and the Interstate Commerce Commission and its members, and their agents, officers, servants, and representatives, from endeavoring to recover any penalties, or from prosecuting or seeking to prosecute, by indictment, complaint, or otherwise, any of the petitioners for a failure to comply with section 4 of the act to regulate commerce as amended June 18, 1910, until said applications Nos. 205, 342, 343, 344, 349, 350, and 352 shall have been finally disposed of in accordance with the opinion and decree of the court, for that the Commerce Court it not a court of appeal with power to review and remand the case to the Interstate Commerce Commission with directions to proceed in accordance with its opinion and decree, but a court of original juris-

diction limited to the power to enjoin, annul, or suspend only.
264 Wherefore, the United States and the said intervening respondents pray that the said final order or decree of the Commerce Court, entered December 9, 1911, be reversed, annulled, and set aside with directions that the petition be dismissed and for such other and further order as may be appropriate.

GEO. W. WICKERSHAM,
Attorney-General of the United States.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

CASSODAY, BUTLER, LAMB & FOSTER,
Solicitors for Chicago Association of Commerce.

A. M. CRAVEN,
JOHN WILEY,
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors for City of Spokane, Washington; for County of Spokane, Washington; for Chamber of Commerce of Spokane, Washington; and for Spokane Jobbers' Association of Spokane, Washington.

BYRON WATERS,
Solicitor for Interior Counties Freight Bureau of Southern California and for Maricopa County Commercial Club of Phoenix, Arizona.

WILLIAM A. GLASGOW, JR.,
Solicitor for Giroux Consolidated Mines Company.

265 *Order allowing appeal.*

(Filed December 20, 1911.)

In the United States Commerce Court.

December session, 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND sixteen other railroad companies, petitioners,
v.
THE UNITED STATES OF AMERICA, RESPONDENT, AND NINE INTERVENING respondents. } No. 50.

ORDER ALLOWING APPEAL.

In the above entitled cause, the United States of America, Interstate Commerce Commission; Chicago Association of Commerce; City of Spokane, Washington; and County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; Spokane Jobbers' Association of Spokane, Washington; Interior Counties Freight Bureau of Southern California; Maricopa County Commercial Club of Phoenix, Arizona; and Giroux Consolidated

Mines Company, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the Commerce Court entered December 9, 1911 (excepting the part thereof denying the separate motion of Western Pacific Railway Company), and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and decreed, That the said appeal be, and the same is hereby, allowed as prayed and made returnable on the 19th day of January, A. D. 1912, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court in said cause.

266 *Præcipe.*

(Filed December 23, 1911.)

In the United States Commerce Court.

December session, 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.
v.
UNITED STATES OF AMERICA. } No. 50.

PRÆCIPE FOR RECORD.

To the clerk:

You will please prepare a transcript of the record in the above entitled cause, to be filed in the office of the clerk of the Supreme Court of the United States, upon the appeal from the final order or decree of the Commerce Court entered December 9, 1911, and include in said transcript the following pleadings, proceedings, and papers on file or of record, to wit:

Petition for injunction.

Motion of the United States to dismiss the petition.

Motion of the Interstate Commerce Commission to dismiss the petition.

Intervening petition of Chicago Association of Commerce and order allowing the same.

Intervening petition of City of Spokane, County of Spokane, Chamber of Commerce of Spokane, and Spokane Jobbers' Association, and order allowing the same.

Intervening petition of Interior Counties Freight Bureau of Southern California and Maricopa County Commercial Club of Phoenix, Arizona, and order allowing the same.

Intervening petition of Giroux Consolidated Mines Company and order allowing the same.

Interlocutory order of the Commerce Court granting preliminary injunction, November 9, 1911.

Opinion of the Commerce Court, filed November 14, 1911.

Notice of the United States and the Interstate Commerce Commission of their election to stand on their motions to dismiss.

267 Order setting case for further hearing.

Motion of Chicago Association of Commerce to dismiss the petition.

Motion of Western Pacific Railway Company to set the case for hearing to permit it to introduce evidence.

Final decree of the Commerce Court.

Petition for appeal, assignment of errors, and order allowing appeal.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General, for the United States.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

CASSODAY, BUTLER, LAMB & FOSTER,
Solicitors for Chicago Association of Commerce.

A. M. CRAVEN,
JOHN WILEY,
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors for City of Spokane, Washington; for County of Spokane, Washington; for Chamber of Commerce of Spokane, Washington; and for Spokane Jobbers' Association of Spokane, Washington.

BYRON WATERS,
Solicitor for Interior Counties Freight Bureau of Southern California and for Maricopa County Commercial Club of Phoenix, Arizona.

WILLIAM A. GLASGOW, JR.,
Solicitor for Giroux Consolidated Mines Company.

DECEMBER 22, 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; UNION Pacific Railroad Company; Oregon Short Line Railroad Company; Oregon-Washington Railroad & Navigation Company; Southern Pacific Company; Northern Pacific Railway Company; Great Northern Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & North Western Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Puget Sound Railway Company; Denver & Rio Grande Railroad Company; Missouri Pacific Railway Company; Western Pacific Railway Company; San Pedro, Los Angeles & Salt Lake Railroad Company; Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company, petitioners.

vs.

UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission; City of Spokane et al.; Chicago Association of Commerce; Interior Counties Freight Bureau of Southern California et al.; Giroux Consolidated Mines Company, interveners.

No. 50.

UNITED STATES OF AMERICA, *ss:*

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 267, inclusive) to be a true and complete transcript of the proceedings had of record in the above-entitled cause, made in accordance with the præcipe filed in the clerk's office of said court on the 23d day of December, A. D. 1911, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 27th day of December, A. D. 1911.

[SEAL.]

G. F. SNYDER, *Clerk*,
By W. S. HINMAN, *Deputy Clerk*.

269 *Citation on appeal.*

UNITED STATES OF AMERICA, *ss:*

To Atchison, Topeka & Santa Fe Railway Company; Union Pacific Railroad Company; Oregon Short Line Railroad Company; Oregon-Washington Railroad & Navigation Company; Southern

Pacific Company; Northern Pacific Railway Company; Great Northern Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & North Western Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Puget Sound Railway Company; Denver & Rio Grande Railroad Company; Missouri Pacific Railway Company; Western Pacific Railway Company; San Pedro, Los Angeles & Salt Lake Railroad Company; Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof pursuant to an appeal duly allowed and filed in the clerk's office of the United States Commerce Court, wherein the United States of America; Interstate Commerce Commission; Chicago Association of Commerce, a corporation; City of Spokane, Washington; and County of Spokane, Washington, municipal corporations; Chamber of Commerce of Spokane, Washington, a corporation; Spokane Jobbers' Association of Spokane, Washington, an association; Interior Counties Freight Bureau of Southern California, an association; Maricopa County Commercial Club, of Phoenix, Arizona, an association; and Giroux Consolidated Mines Company, a corporation, are appellants, and you are appellees, to show cause, if any there be, why the final order or decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin A. Knapp, presiding judge
270 of the United States Commerce Court, this 20th day of December, in the year of our Lord nineteen hundred and eleven.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court.

Service of a copy of the within citation is hereby admitted this 26th day of December, A. D. 1911.

F. C. DILLARD,
ROBT. DUNLAP,
CHARLES DONNELLY,
E. C. LINDLEY,
ROBERT BRUCE SCOTT,
JAMES C. JEFFERY,
Solicitors for all Appellees

271 In the Supreme Court of the United States.

October term, 1911.

UNITED STATES OF AMERICA AND OTHERS, APPELLANTS,
v.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND Others, appellees. } No. —.

Stipulation.

It is hereby stipulated and agreed, by and between the parties to the above-entitled cause, by their respective counsel, that the following matter contained in the record in the above-entitled cause, viz:

Petition for injunction;

Motion of the United States to dismiss the petition;

Motion of Interstate Commerce Commission to dismiss the petition;

Intervening petition of Chicago Association of Commerce, and order allowing the same;

Intervening petition of City of Spokane, County of Spokane, Chamber of Commerce of Spokane, and Spokane Jobbers' Association, and order allowing the same;

Intervening petition of Interior Counties Freight Bureau of Southern California and Maricopa County Commercial Club, of Phoenix, Arizona, and order allowing the same;

Intervening petition of Giroux Consolidated Mines Company, and order allowing the same;

Interlocutory order of the Commerce Court, granting preliminary injunction, November 9, 1911;

Opinion of the Commerce Court, filed November 14, 1911;

is contained in the record in United States of America et al., appellants, *v.* Atchison, Topeka & Santa Fe Railway Company et
272 al., appellees, No. 883, Supreme Court, October term, 1911, and need not be reprinted in the record in the above-entitled cause; but that upon the hearing of the above-entitled cause, the court and the counsel may refer to the same as printed in the record in No. 883 to all intents and purposes as though printed in the record

herein. Nothing herein shall prevent appellees from suggesting a diminution of the record.

December 26, 1911.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General, for the United States.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

CASSODAY, BUTLER, LAMB & FOSTER
and RUSH A. BUTLER,
Solicitors for Chicago Association of Commerce.

A. M. CRAVEN,
JOHN WILEY,
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors for City of Spokane, Washington; for County of Spokane, Washington; for Chamber of Commerce of Spokane, Washington; and for Spokane Jobbers' Association, of Spokane, Washington.

BYRON WATERS,
Solicitor for Interior Counties Freight Bureau of Southern California and for Maricopa County Commercial Club, of Phoenix, Arizona.

WILLIAM A. GLASGOW, JR.,
Solicitor for Giroux Consolidated Mines Company.

ROBT. DUNLAP,
CHAS. DONNELLY,
E. C. LINDLEY,
R. B. SCOTT,
F. C. DILLARD,
JAMES C. JEFFERY
(for Denver & Rio Grande R. R.),
For all Appellees Except Western Pacific.

FRANKLIN W. MCCUTCHEON,
JAMES C. JEFFERY,
Solicitors for Western Pacific Railway Company.

273 (Indorsed:) File No. 23004. Supreme Court U. S. October term, 1911. Term No. 928. The United States of America et al., appellants, vs. Atchison, Topeka & Santa Fe Railway Company et al. Stipulation as to printing record. Filed January 10, 1912.

(Indorsement on cover:) File No. 23004. United States Commerce Court. Term No. 928. The United States of America, Interstate Commerce Commission, et al., appellants, vs. Atchison, Topeka & Santa Fe Railway Company et al. Filed January 10th, 1912. File No. 23004.

○

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1911~~ 1912.

No. ~~924~~ 163

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS,

vs.

UNION PACIFIC RAILROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

FILED JANUARY 10, 1912.

(23005)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 929.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS,

vs.

UNION PACIFIC RAILROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

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a United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY; OREGON-WASHINGTON Railroad & Navigation Company; Oregon Short Line Railroad Company; Northern Pacific Railway Company; Great Northern Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & North Western Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Puget Sound Railway Company; Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company, petitioners,

vs.

UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission, City of Spokane et al., Chicago Association of Commerce, Portland Chamber of Commerce et al., Giroux Consolidated Mines Company, interveners. } No. 51.

UNITED STATES OF AMERICA, *ss:*

Be it remembered, that in the United States Commerce Court, in the city of Washington, District of Columbia, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

84 *Notice of the United States and the Interstate Commerce Commission.*

(Filed November 21, 1911.)

In the United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY ET AL., PETITIONERS,
v.
UNITED STATES OF AMERICA, RESPONDENT, AND Interstate Commerce Commission et al., intervening respondents. } In Equity. No. 51.

MOTION.

Come now the United States, respondent, and the Interstate Commerce Commission, intervening respondent, in the above-entitled case, and inform the court that the United States elects to stand upon its motion to dismiss.

J. A. FOWLER,
Assistant to the Attorney General,
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General,
For United States.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

85 *Order setting cause for further hearing.*

(Entered November 21, 1911.)

United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY ET AL., PETITIONERS,
vs.
THE UNITED STATES, RESPONDENT, AND THE INTERSTATE COMMERCE COMMISSION ET AL., INTERVENERS. } No. 51.

In the matter of motion of the United States and the Interstate Commerce Commission for final decree.

Upon consideration of a motion filed by the United States and the Interstate Commerce Commission in the above-entitled case, on November 21, 1911, a copy of which is hereto attached,

It is ordered that said case be assigned for consideration of said motion at the court room of this court in Washington, D. C., on December 5, 1911, at 10.30 a. m.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

86 *Motion of Chicago Association of Commerce to dismiss.*

(Filed December 5, 1911.)

In the United States Commerce Court,

November term, A. D. 1911.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., petitioners.
vs.
UNITED STATES OF AMERICA, RESPONDENT. } No. 50.

MOTION TO DISMISS, BY CHICAGO ASSOCIATION OF COMMERCE, ONE OF THE INTERVENERS.

Now comes the Chicago Association of Commerce, one of the interveners, and moves to dismiss the original petition herein and to vacate the temporary injunction heretofore entered for lack of jurisdiction in this honorable court to entertain said original petition;

Because this court has only such jurisdiction to set aside the orders of the Interstate Commerce Commission as was possessed by the Circuit Courts of the United States prior to June 18, 1910;

Because the Circuit Courts of the United States prior to June 18, 1910, had no jurisdiction to enjoin orders of the commission entered on applications filed solely under and by virtue of the amend-

87 ment of June 18, 1910, to section 4 of the act to regulate commerce; and

Because the applications filed and the proceedings had before the Interstate Commerce Commission upon which were entered the orders sought to be enjoined in the above entitled cause were entertained by said commission solely under and by virtue of said amendment of June 18, 1910,

And for further ground of this motion, shows that even if it be assumed that this court would ordinarily have jurisdiction over orders of the commission entered under the amendment of June 18, 1910, to the fourth section, still this court does not have jurisdiction over the order here complained of:

Because of this court is correct in holding that the proviso in section four as amended imposed upon the commission the duty not only to grant exemption from the hard and fast rule of this section, but also at one and the same time to fix the reasonable maximum rates involved in the application by the carriers, it would necessarily follow that the commission in this case failed in the performance *ance* of its plain duty, and the remedy for the carriers would be by writ of mandamus in the Supreme Court of the District of Columbia.

CASSODAY, BUTLER, LAMB & FOSTER,
Attorneys for Intervener.

RUSH C. BUTLER,
WILLIAM E. LAMB,
STEPHEN A. FOSTER,
CORNELIUS LYNDE,
Of Counsel.

88 *Final decree.*

(Entered December 9, 1911.)

In the United States Commerce Court.

December session, 1911.

UNION PACIFIC RAILROAD COMPANY; OREGON-WASHINGTON Railroad & Navigation Company; Oregon Short Line Railroad Company; Northern Pacific Railway Company; Great Northern Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & North Western Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Puget Sound Railway Company; Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company, petitioners.	No. 51.
v.	
UNITED STATES OF AMERICA, RESPONDENT.	

On this day this cause came on further to be heard, whereupon came petitioners, the United States of America, respondent, and the Interstate Commerce Commission, intervening respondent, and

89 said Interstate Commerce Commission, intervening respondent, in open court prays to withdraw its answer heretofore filed herein and join in the motion of the United States to dismiss this cause. Thereupon also appear the Portland Chamber of Commerce, Transportation Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club, interveners, and waive their right to further plead or answer herein; also appear interveners, City of Spokane, Washington, County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; Spokane Jobbers' Association, of Spokane, Washington, and each and all pray leave of the court to withdraw their answer herein and join in the motion of the United States to dismiss this cause. Also appears the Chicago Association of Commerce, and prays leave of the court to withdraw its answer herein, and files its motion to dismiss this cause, and also joins in the motion of the United States to dismiss this cause; also appears the intervener, the Giroux Consolidated Mines Company, a corporation under the laws of the State of Delaware, and waives its right to further plead or answer herein, and joins in the motion of the United States to dismiss this cause.

Whereupon, the matter and things for consideration are argued by Blackburn Esterline and J. A. Fowler, solicitors for the
90 United States of America, and by P. J. Farrell, solicitor for the Interstate Commerce Commission, and by W. E. Lamb, solicitor for the Chicago Association of Commerce, and by F. C. Dillard, solicitor for the petitioners, and said motion of the Chicago Association of Commerce having been argued by Stephen A. Foster, solicitor for Chicago Association of Commerce.

Thereupon, upon consideration, the court doth order, adjudge, and decree as follows:

First. The waiver of interveners as above shown of their right to plead or answer herein is recognized and allowed, and the prayer of those so requesting to join in the said motion of the United States to dismiss the cause is granted; and the prayer of interveners or respondents as above shown who have answered, to withdraw their answers herein filed, is granted, and their prayer to join in the said motion of the United States to dismiss this cause is likewise granted.

Second. The motion of the Chicago Association of Commerce to dismiss this cause is denied.

Third. The motion of the United States, joined in by the Interstate Commerce Commission and the other interveners, as above shown, to dismiss this cause, is denied.

Fourth. Whereupon said respondent, the United States of America, and intervening respondent, the Interstate Commerce Commis-
91 sion, and the other interveners herein, declining to further plead or answer herein, and, except the Portland Chamber of Commerce, Transportation Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club, electing to stand upon the motions to dismiss this cause, and it appearing that

due and proper notice has been given to all the parties of this hearing, the court doth proceed to enter final decree, and for the reasons stated in the opinion of the court filed on the 14th day of November, 1911, doth order, adjudge, and decree as follows:

(a) That the equities of this cause are with petitioners and they are entitled to relief as hereinafter granted.

(b) That the order of the Interstate Commerce Commission sought to be enjoined in this cause, to wit, the order entered in case No. 879 on the docket of the Interstate Commerce Commission, city of Spokane, Washington, et al., vs. Northern Pacific Railway Company et al., on the 22nd day of June, 1911, is invalid and is hereby set aside and held for naught.

(c) That the temporary injunction heretofore granted in this case by the court on the ninth day of November, 1911, is hereby made permanent; and that the United States of America, the Interstate Commerce Commission, and their members, agents, officers,
92 servants, and representatives, be, and they hereby are, forever enjoined from enforcing or taking any steps to enforce said order of June 22, 1911, or from instituting any proceedings for the enforcement thereof, or from endeavoring to recover any penalties by reason of disobedience to said order, or from prosecuting or seeking to prosecute, by indictment, complaint, or otherwise, any of the petitioners for disobedience to said order; or for a failure to comply with the fourth section of the act to regulate interstate commerce as amended on the 18th day of June, 1910, relative to charging a greater rate for the shorter haul included within the longer than for the longer on the matters covered by said applications pending before the Interstate Commerce Commission until said applications shall have been finally disposed of in accordance with the opinion and decree of this court.

Sixth. That a certified copy of this order be served upon the Attorney General of the United States and the chairman of the Interstate Commerce Commission.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

To which the respondent and the interveners (except the Portland Chamber of Commerce, the Transportation Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club) several object and except.

93 *Petition for appeal.*

(Filed December 20, 1911.)

In the United States Commerce Court.

December session, 1911.

UNION PACIFIC RAILROAD COMPANY AND TEN OTHER RAILROAD companies, petitioners; and Portland Chamber of Commerce, a corporation; the Transportation Bureau of Seattle Chamber of Commerce, an association; and Transportation Bureau of Tacoma Commercial Club, an association, intervening petitioners,

v.

THE UNITED STATES OF AMERICA, RESPONDENT, AND SEVEN intervening respondents. } No. 51.

PETITION FOR APPEAL.

The United States of America, respondent; Interstate Commerce Commission; Chicago Association of Commerce, a corporation; City of Spokane, Washington, and County of Spokane, Washington, municipal corporations; Chamber of Commerce of Spokane, Washington, a corporation; Spokane Jobbers' Association of Spokane, Washington, an association; and Giroux Consolidated Mines Company, a corporation, intervening respondents, feeling themselves aggrieved by the final order or decree of the Commerce Court, entered December 9, 1911, by their respective counsel pray an appeal to the Supreme Court of the United States from the said final order or decree.

The particulars wherein the United States and the said intervening respondents consider said final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

And the United States and the said intervening respondents pray that a transcript of the record, proceedings, and papers on
94 which the said order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

GEO. W. WICKERSHAM,
Attorney General of the United States.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.
CASSODAY, BUTLER, LAMB & FOSTER,
Solicitors for Chicago Association of Commerce.
A. M. CRAVEN,
JOHN WILEY,
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors for City of Spokane, Washington; for County of Spokane, Washington; for Chamber of Commerce of Spokane, Washington; and for Spokane Jobbers' Association of Spokane, Washington.
WILLIAM A. GLASGOW, Jr.,
Solicitor for Giroux Consolidated Mines Company.

Allowed:

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court in said cause.

95 *Assignment of errors.*

(Filed December 20, 1911.)

In the United States Commerce Court.

December session, 1911.

UNION PACIFIC RAILROAD COMPANY AND TEN OTHER RAILROAD companies, petitioners; and Portland Chamber of Commerce, a corporation; the Transportation Bureau of Seattle Chamber of Commerce, an association; and Transportation Bureau of Tacoma Commercial Club, an association, intervening petitioners,
v.
THE UNITED STATES OF AMERICA, RESPONDENT, AND SEVEN INTERVENING RESPONDENTS. } No. 51.

ASSIGNMENT OF ERRORS.

Come now the United States of America, respondent; Interstate Commerce Commission; Chicago Association of Commerce; City of Spokane, Washington, and County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; Spokane Jobbers' Association, of Spokane, Washington; and Giroux Consolidated Mines Company, by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely upon said appeal to the Supreme Court of the United States from the final order or decree of the Commerce Court entered against them December 9, 1911, in the above-entitled cause.

The Commerce Court erred:

I.

In denying the separate motion of the United States to dismiss the petition.

96 II.

In denying the separate motion of the Chicago Association of Commerce to dismiss the petition.

III.

In making permanent the preliminary injunction granted November 9, 1911, and in permanently enjoining the order of the Interstate Commerce Commission entered June 22, 1911, on complaint of

the City of Spokane and others against Northern Pacific Railway Company and others, case No. 879, and declaring invalid the same, for that the (a) petition does not set forth any cause of action and is insufficient to warrant the granting of the injunction or to form the basis for any relief from the said order; (b) nor have the said petitioners shown that there is any equity in the said petition upon which to grant the injunction or to form the basis for any relief from the said order; (c) nor have the petitioners shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce; (d) nor have the petitioners shown that in making its said order the Interstate Commerce Commission violated any right of the said petitioners protected by the Constitution of the United States or any other right of the said petitioners over which this court may exercise jurisdiction.

IV.

In holding that section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as
97 amended by an act entitled "An act to create a Commerce Court," approved June 18, 1910, when properly construed, does not authorize the division of the United States into the five zones prescribed and adopted by the Interstate Commerce Commission as a basis upon which to make and prescribe rates, fares, and charges of common carriers under said section 4, and that the same was beyond the power of the Interstate Commerce Commission.

V.

In holding that said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved July 18, 1910, when properly construed, does not authorize the percentage bases prescribed and adopted by the Interstate Commerce Commission for the purpose of making and prescribing the rates, fares, and charges of common carriers under said section 4, and that the same was beyond the power of the Interstate Commerce Commission.

VI.

In holding that said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed, does not authorize the division of the United States into the five zones prescribed and adopted by the Interstate Commerce Commission and the percentage bases prescribed and adopted by the Interstate Commerce Commission, and the making of rates, fares, and charges

from the said zones on the said percentage bases and that in
98 adopting such a method of making and prescribing rates, fares, and charges of common carriers under said section 4 the Interstate Commerce Commission acted beyond its power and authority.

VII.

In holding that if the said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed, authorizes the percentage bases prescribed and adopted by the Interstate Commerce Commission for the purpose of making rates, fares, and charges of common carriers under said section 4, that the said section 4, as so construed, is beyond the power of Congress to enact and is unconstitutional and void.

VIII.

In holding that if the said section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, when properly construed, authorizes the Interstate Commerce Commission to divide the United States into the five zones prescribed and adopted by the said commission and to make rates, fares, and charges from the said five zones on the percentage bases adopted by the Interstate Commerce Commission, that said section 4, as so construed, is beyond the power of Congress to enact and is unconstitutional and void.

99 IX.

In making permanent the preliminary injunction granted November 9, 1911, and in permanently enjoining the said order of the Interstate Commerce Commission entered June 22, 1911, and declaring invalid the same, for that the Interstate Commerce Commission in making and entering the said order did proceed in all respects in accordance with the statute in such case made and provided, and after a full hearing and by virtue of its authority in that behalf, did prescribe the extent to which the petitioners may be relieved from the operation of said section 4 of the act of Congress, entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910.

X.

In making permanent the preliminary injunction and permanently enjoining the said order of June 22, 1911, for that even though the said order is null and void as beyond the power and authority of the Interstate Commerce Commission, nevertheless, in granting the injunction, in the manner and form in which the same was granted, the Commerce Court suspended and annulled the provisions of said

section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, and continued in force and effect the rates, fares, and charges then existing, whereas when the said order of June 22, 1911, was entered the applications filed before the commission had been deter-
100 mined within the meaning of the second proviso of said section 4, and either said order thereupon became effective or the requirement of the statute that petitioners shall not charge more for a shorter than for a longer haul became absolute and said statutory requirement is not subject to the injunctive power of the court.

XI.

In forever enjoining the United States of America, and the Interstate Commerce Commission, and its members, and their agents, officers, servants, and representatives from endeavoring to recover any penalties, or from prosecuting or seeking to prosecute by indictment, complaint, or otherwise, any of the petitioners for a failure to comply with section 4 of the act to regulate commerce, as amended June 18, 1910, relative to charging a greater rate for the shorter haul included within the longer than for the longer on the matters covered by the applications pending before the Interstate Commerce Commission until said applications shall have been finally disposed of in accordance with the opinion and decree of the court, for that the Commerce Court is not a court of appeal with power to review and remand the case to the Interstate Commerce Commission with directions to proceed in accordance with its opinion and decree, but a court of original jurisdiction limited to the power to enjoin, annul, or suspend only.

101 Wherefore the United States and the said intervening respondents pray that the said final order or decree of the Commerce Court, entered December 9, 1911, be reversed, annulled and set aside with directions that the petition be dismissed and for such other and further order as may be appropriate.

GEO. W. WICKERSHAM,
Attorney General of the United States.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.
CASSODAY, BUTLER, LAMB & FOSTER,
Solicitors for Chicago Association of Commerce.
A. M. CRAVEN,
JOHN WILEY,
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors for City of Spokane, Washington; for the County of Spokane, Washington; for Chamber of Commerce of Spokane, Washington; and for Spokane Jobbers' Association of Spokane, Washington.
WILLIAM A. GLASGOW, Jr.,
Solicitor for Giroux Consolidated Mines Company.

102 *Order allowing appeal.*

(Filed December 20, 1911.)

In the United States Commerce Court.

December session, 1911.

UNION PACIFIC RAILROAD COMPANY AND TEN OTHER RAILROAD companies, petitioners; and Portland Chamber of Commerce, a corporation; The Transportation Bureau of Seattle Chamber of Commerce, an association; and Transportation Bureau of Tacoma Commercial Club, an association, intervening petitioners,
v.
THE UNITED STATES OF AMERICA, RESPONDENT, AND SEVEN intervening respondents. } No. 51.

ORDER ALLOWING APPEAL.

In the above-entitled cause, the United States of America, Interstate Commerce Commission, Chicago Association of Commerce, City of Spokane, Washington, and County of Spokane, Washington; Chamber of Commerce of Spokane, Washington; Spokane Jobbers' Association of Spokane, Washington; and Giroux Consolidated Mines Company having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the Commerce Court entered December 9, 1911, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and decreed that the said appeal be, and the same is hereby, allowed as prayed and made returnable on the 19th day of January, A. D. 1912, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court in said cause.

103 *Præcipe.*

(Filed December 23, 1911.)

In the United States Commerce Court.

December Session, 1911.

UNION PACIFIC RAILROAD COMPANY ET AL.
v.
UNITED STATES OF AMERICA. } No. 51.

PRÆCIPE FOR RECORD.

To the clerk:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the clerk of the Supreme

Court of the United States, upon the appeal from the final order or decree of the Commerce Court entered December 9, 1911, and include in said transcript the following pleadings, proceedings, and papers on file or of record, to wit:

Petition for injunction.

Intervening petition of Portland Chamber of Commerce, etc.

Motion of the United States to dismiss the petition.

Intervening petition of Chicago Association of Commerce and order allowing the same.

Intervening petition of City of Spokane, County of Spokane, Chamber of Commerce of Spokane, and Spokane Jobbers' Association, and order allowing the same.

Intervening petition of Giroux Consolidated Mines Company and order allowing the same.

Interlocutory order of the Commerce Court granting preliminary injunction, November 9, 1911.

Opinion of the Commerce Court filed November 14, 1911.

Notice of the United States and the Interstate Commerce Commission of the election to stand on the motion of the United States to dismiss.

Order setting case for further hearing.

Motion of Chicago Association of Commerce to dismiss the petition.

Final decree of the Commerce Court.

104 Petition for appeal, assignment of errors, and order allowing appeal.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General, for the United States.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

CASSODAY, BUTLER, LAMB & FOSTER,
Solicitors for Chicago Association of Commerce.

A. M. CRAVEN,
JOHN WILEY,
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors for City of Spokane, Wash., for County of Spokane, Wash., for Chamber of Commerce of Spokane, Wash., and for Spokane Jobbers' Association of Spokane, Wash.

WILLIAM A. GLASGOW, Jr.,
Solicitor for Giroux Consolidated Mines Company.

DECEMBER 22, 1911.

105 United States Commerce Court.

UNION PACIFIC RAILROAD COMPANY; OREGON-WASHINGTON Railroad & Navigation Company; Oregon Short Line Railroad Company; Northern Pacific Railway Company; Great Northern Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & North Western Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Puget Sound Railway Company; Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company, petitioners,

vs.

UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE Commission; City of Spokane et al.; Chicago Association of Commerce; Portland Chamber of Commerce et al.; Giroux Consolidated Mines Company, interveners.

No. 51.

UNITED STATES OF AMERICA, *ss:*

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 104, inclusive) to be a true and complete transcript of the proceedings had of record in the above-entitled cause, made in accordance with the præcipe filed in the clerk's office of said court on the 23d day of December, A. D. 1911, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 27th day of December, A. D. 1911.

[SEAL.]

G. F. SNYDER, *Clerk*,
By W. S. HINMAN, Deputy Clerk.

106 *Citation on appeal.*

UNITED STATES OF AMERICA, *ss:*

To Union Pacific Railroad Company; Oregon-Washington Railroad & Navigation Company; Oregon Short Line Railroad Company; Northern Pacific Railway Company; Great Northern Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Milwaukee & Puget Sound Railway Company; Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Portland

Chamber of Commerce, a corporation; the Transportation Bureau of Seattle Chamber of Commerce, an association; Transportation Bureau of Tacoma Commercial Club, an association.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal duly allowed and filed in the clerk's office of the United States Commerce Court, wherein the United States of America; Interstate Commerce Commission; Chicago Association of Commerce, a corporation; City of Spokane, Washington, and County of Spokane, Washington, municipal corporations; Chamber of Commerce of Spokane, Washington, a corporation; Spokane Jobbers' Association of Spokane, Washington, an association; and Giroux Consolidated Mines Company, an association, are appellants and you are appellees, to show cause, if any there be, why the final order or decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin A. Knapp, presiding judge
107 of the United States Commerce Court, this twentieth day of December, in the year of our Lord, nineteen hundred and eleven.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court.

Service of a copy of the within citation is hereby admitted this 26 day of Dec., A. D. 1911.

ROBT. DUNLAP,
CHAS. DONELY,
E. C. LINDLEY,
R. B. SCOTT,
J. C. JEFFERY,
F. C. DILLARD,
Solicitors for Union Pacific Railroad Company and the ten other railroad companies mentioned, Appellees.

J. N. TEAL,
By F. C. DILLARD,
Solicitor for Portland Chamber of Commerce, Transportation Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club, Appellees.

108 In the United States Commerce Court.

December session, 1911.

UNITED STATES OF AMERICA AND OTHERS, APPELLANTS,
v.
UNION PACIFIC RAILROAD COMPANY AND OTHERS, APPELLEES. } No.

Stipulation.

It is hereby stipulated and agreed, by and between the parties to the above-entitled cause by their respective counsel, that the following matter contained in the record in the above-entitled cause, viz:

Petition for injunction;

Motion of the United States to dismiss the petition;

Intervening petition of Chicago Association of Commerce, and order allowing the same;

Intervening petition of Portland Chamber of Commerce, Transportation Bureau of Seattle Chamber of Commerce, and Transportation Bureau of Tacoma Commercial Club, and order allowing the same;

Intervening petition of City of Spokane, County of Spokane, Chamber of Commerce of Spokane, and Spokane Jobbers' Association, and order allowing the same;

Intervening petition of Giroux Consolidated Mines Company, and order allowing the same;

Interlocutory order of the Commerce Court granting preliminary injunction, November 9, 1911;

is contained in the record in United States of America et al., appellants, v. Union Pacific Railroad Company et al., appellees, No. 884, Supreme Court, October term, 1911, and need not be reprinted in the record in the above-entitled cause, but that upon the hearing of the above-entitled cause, the court and the counsel may refer to the same as printed in the record in No. 884 to all intents and purposes as though printed in the record herein.

It is further stipulated and agreed that the opinion of the Commerce Court, filed November 14, 1911, is contained in the
109 record in United States of America et al. v. Atchison, Topeka & Santa Fe Railway Company et al., No. 883, Supreme Court, October term, 1911, and need not be printed in the record in the above-entitled cause, but that upon the hearing of the above-entitled cause, the court and the counsel may refer to the same as printed in the record in No. 883 to all intents and purposes as though printed in the record herein.

Nothing herein contained shall prevent appellees from suggesting a diminution of the record in this cause.

December 26", 1911.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General,
For the United States.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

CASSODAY, BUTLER, LAMB & FOSTER,
AND RUSH C. BUTLER,
Solicitors for Chicago Association of Commerce.

A. M. CRAVEN,
JOHN WILEY,
J. B. CAMPBELL,
H. M. STEPHENS,
Solicitors for City of Spokane, Washington, for County of Spokane, Washington, for Chamber of Commerce of Spokane, Washington, and for Spokane Jobbers' Association of Spokane, Washington.

WILLIAM A. GLASGOW, JR.,
Solicitor for Giroux Consolidated Mines Company.

ROBT. DUNLAP,
CHARLES DONNELLY,
E. C. LINDLEY,
R. B. SCOTT,
F. C. DILLARD,
Solicitors for all Appellees.

J. N. TEAL,
By F. C. DILLARD,
Solicitor for Petitioning Intervenors, Portland Chamber of Commerce, Trans. Bureau of Seattle Chamber of Commerce, & Trans. Bureau of Tacoma Com. Club.

110 (Indorsed:) File No. 23005. Supreme Court U. S. October term, 1911. Term No., 929. The United States of America et al., appellants, vs. Union Pacific Railroad Company et al. Stipulation as to printing record. Filed January 10, 1912.

(Indorsement on cover:) File No. 23005. United States Commerce Court. Term No., 929. The United States of America, Interstate Commerce Commission et al., appellants, vs. Union Pacific Railroad Company et al. Filed January 10th, 1912. File No. 23005.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

UNITED STATES OF AMERICA AND OTHERS, appellants, *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY Company and others.	No. 883.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

MOTION TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and moves the court to advance the above-entitled cause for hearing at this term.

The appeal is from an interlocutory order or decree of the Commerce Court, entered November 9, 1911, granting a preliminary injunction against the enforcement of an order of the Interstate Commerce Commission.

The following questions, among others, are involved:

1. Whether section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled

"An act to create a Commerce Court," etc., approved June 18, 1910 (36 Stat., 539), is constitutional.

2. Whether the action of the Interstate Commerce Commission had and taken July 31, 1911, in passing upon applications Nos. 205, 342, 343, 344, 349, 350, and 352 on behalf of the Transcontinental Freight Bureau for relief from the provisions of said section 4 is an order of the Interstate Commerce Commission within the meaning of section 1 of an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910.

3. Whether the Commerce Court had jurisdiction and power to issue the preliminary injunction in question.

4. Whether said section 4 authorizes the division of the United States into the five zones prescribed and adopted by the Interstate Commerce Commission and the adoption of the percentage bases by the Interstate Commerce Commission, and the making of rates, fares, and charges from the said zones on the said percentage bases.

5. Whether the Commerce Court had jurisdiction and power to enjoin and suspend the order of the Interstate Commerce Commission and at the same time suspend the operation of the provisions of section 4, which prohibits appellees from charging more for the shorter than for the long haul, unless otherwise authorized by the Interstate Commerce Commission.

6. Whether, if the order of the Interstate Commerce Commission is null and void as beyond its power and

authority, the appellees are not violating the provisions of section 4 and subjecting themselves to the penalties for violation of the statute in such case made and provided.

7. The public interests are involved.

The priority suggested is authorized by section 2 of the act of June 18, 1910 (36 Stat. L., Pt. I, c. 309, p. 542).

Opposing counsel concur in the motion to advance.

F. W. LEHMANN,
Solicitor General.

DECEMBER, 1911.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

UNITED STATES OF AMERICA AND OTHERS, appellants, *v.* UNION PACIFIC RAILROAD COMPANY AND others.	No. 884.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

MOTION TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and moves the court to advance the above-entitled cause for hearing at this term.

The appeal is from an interlocutory order or decree of the Commerce Court, entered November 9, 1911, granting a preliminary injunction against the enforcement of an order of the Interstate Commerce Commission.

The following questions, among others, are involved:

1. Whether section 4 of the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, as amended by an act entitled "An act

to create a Commerce Court," etc., approved June 18, 1910 (36 Stat., 539), is constitutional.

2. Whether said section 4 authorizes the division of the United States into the five zones prescribed and adopted by the Interstate Commerce Commission and the adoption of the percentage bases by the Interstate Commerce Commission, and the making of rates, fares, and charges from the said zones on the said percentage bases.

3. Whether the Commerce Court had jurisdiction and power to enjoin and suspend the order of the Interstate Commerce Commission and at the same time suspend the operation of the provisions of section 4, which prohibits appellees from charging more for the shorter than for the long haul, unless otherwise authorized by the Interstate Commerce Commission.

4. Whether, if the order of the Interstate Commerce Commission is null and void as beyond its power and authority, the appellees are not violating the provisions of section 4 and subjecting themselves to the penalties for violation of the statute in such case made and provided.

5. The public interests are involved.

The priority suggested is authorized by section 2 of the act of June 18, 1910 (36 Stat. L., Pt. I, c. 309, p. 542).

Opposing counsel concur in the motion to advance.

F. W. LEHMANN,
Solicitor General.

DECEMBER, 1911.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES OF AMERICA ET AL., Appellants, *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL. } No. 928.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

MOTION TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and moves the court to advance the above-entitled cause for hearing on February 19, 1912, with *United States of America et al.*, appellants, v. *Atchison, Topeka & Santa Fe Railway Company et al.*, No. 883.

As cause for this motion it is shown that the appeal in No. 883 is from the interlocutory order or decree of the Commerce Court granting a preliminary injunction, and the present appeal is from the final order or decree of the Commerce Court making said preliminary injunction permanent, for the reasons stated in its opinion filed November 14, 1911, after hearing the motion for a preliminary injunction.

The appellants and the appellees are the same as in No. 883, and the two appeals may be heard

on one record. The appeal from the final order or decree raises the same questions as in No. 883, and the following additional questions, viz:

1. Whether or not the Commerce Court is a court of original jurisdiction limited to the power to enjoin, annul, or suspend the order of the Interstate Commerce Commission, or a court of appeal with power to review and remand the case to the Interstate Commerce Commission with directions that the applications of the carriers for relief from the provisions of section 4 of the act to regulate commerce are still pending before the Interstate Commerce Commission as though its order of July 31, 1911, had not been entered.

2. Whether or not the Commerce Court, after permanently enjoining, annulling, and suspending the order of the Interstate Commerce Commission of July 31, 1911, relieving the common carriers from the provisions of section 4 of the act to regulate commerce on applications made by them, had the power to enjoin the United States and the Interstate Commerce Commission and its members and their agents, etc., from endeavoring to recover any penalties or from prosecuting any indictment or complaint against the common carriers for violation of the provisions of said section 4.

Notice has been given opposing counsel.

F. W. LEHMANN,
Solicitor General.

JANUARY, 1912.

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES OF AMERICA et al., appellants,
v.
UNION PACIFIC RAILROAD COMPANY et al.
} No. 929.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

MOTION TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and moves the court to advance the above-entitled cause for hearing on February 19, 1912, with *United States of America et al., appellants*, v. *Union Pacific Railroad Company et al.*, No. 884.

As cause for this motion it is shown that the appeal in No. 884 is from the interlocutory order or decree of the Commerce Court granting a preliminary injunction, and the present appeal is from the final order or decree of the Commerce Court making said preliminary injunction permanent, for the reasons stated in the opinion filed November 14, 1911, after the hearing of the motion for a preliminary injunction.

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The appellants and the appellees are the same as in No. 884, and the two appeals may be heard on one record. The appeal from the final order or decree raises the same questions as in No. 884, and the following additional question, viz:

Whether or not the Commerce Court, after permanently enjoining, annulling, and suspending the order of the Interstate Commerce Commission of June 22, 1911, prescribing the rates of common carriers under section 4 of the act to regulate commerce, had jurisdiction and power to enjoin the United States and the Interstate Commerce Commission and its members and their agents, etc., from endeavoring to recover any penalties or from prosecuting any indictment or complaint against the common carriers for violation of the provisions of said section 4.

Notice has been given opposing counsel.

F. W. LEHMANN,
Solicitor General.

JANUARY, 1912.

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Office Supreme Court, U. S.
FILED.
OCT 24 1912
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

~~Nos. 480 and 513.~~

THE UNITED STATES OF AMERICA ET AL., APPELLANTS,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

~~Nos. 481 and 514.~~

THE UNITED STATES OF AMERICA ET AL., APPELLANTS,

vs.

UNION PACIFIC RAILROAD COMPANY ET AL.

CONSTRUCTION AND CONSTITUTIONALITY OF THE LONG AND SHORT HAUL CLAUSE OF THE INTERSTATE COMMERCE ACT AS AMENDED JUNE 18, 1910.

ARGUMENT

OF

ALFRED P. THOM.

Filed by Leave of Court.

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IS SECTION 4 OF THE ACT TO REGULATE COMMERCE, AS AMENDED JUNE 18, 1910, CONSTITUTIONAL IN SO FAR AS IT UNDERTAKES TO PROHIBIT A SMALLER CHARGE FOR THE TRANSPORTATION OF PASSENGERS, OR OF LIKE KIND OF PROPERTY, FOR A LONGER THAN FOR A SHORTER DISTANCE OVER THE SAME LINE OR ROUTE IN THE SAME DIRECTION UNDER THE CONDITIONS AND WITH THE QUALIFICATIONS STATED IN THE ACT?

In order to determine this question it is necessary to arrive at the proper interpretation of the section as it now stands.

So far as pertinent to the inquiry, the language of the statute is as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance. * * * Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation,

> be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

The proviso to the above section is practically the same as the proviso contained in section 4 of the Act to Regulate Commerce before it was amended on June 18, 1910.

The first part of the section was, however, before the amendment of June 18, 1910, as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance."

It will, therefore, be seen that, considered from the standpoint of the question now under discussion, the important amendment introduced by the act of June 18, 1910, was to omit from the section, as it previously was, the words "under substantially similar circumstances and conditions."

The question for determination, therefore, is, what

is the effect of the omission of these words upon the interpretation of the statute?

In order to ascertain this, it would be well to revert to the established interpretation of this section of the act as it stood before the amendment in question.

In respect to this it is to be noted that at no time has it been the intention of Congress to make an inflexible rule that there should be no smaller charge for a longer distance in cases covered by the statute.

When the Act to Regulate Commerce, finally adopted in 1887, was before Congress for consideration, the House, under the leadership of Mr. Reagan, of Texas, adopted an inflexible rule on this subject forbidding absolutely the greater charge for the shorter haul, while the Senate adopted the view that the rule should be subject to exceptions when the circumstances and conditions required it. These divergent views between the House and Senate were sent to a conference committee, and as a result of such conference the section, as it stood prior to the amendment of June 18, 1910, was adopted by both houses of Congress and became the law—the law thus providing that the rule should not be inflexible, but should be subject to the exceptions required by any substantial dissimilarity of circumstances and conditions.

Again, when the amendment to the 4th section was under consideration by Congress in 1910, Mr. Hardy, of Texas, proposed an amendment, the effect of which was to strike out all provisos and make an inflexible

rule forbidding absolutely the greater charge for the shorter haul. His views on this subject were thus expressed by him on page 5917 of the Congressional Record:

> "Now, Mr. Chairman, to state briefly the purposes of the amendment offered by me, it means simply to leave the unconditional proviso that no road should ever be allowed to charge more for the short haul than the long haul covering the same space or portion of the railway."

It thus appears that, on both occasions when this section was under consideration by Congress, the proposition was presented, debated, and rejected that there should be a hard and fast rule on this subject. In view of this and of the debates in Congress on the subject, we think it may be fairly stated that the exception was considered by Congress as necessary to meet a substantial condition, and that without it the rule would never have been enacted.

As soon as the act of 1887 was passed, important questions arose as to its interpretation. In respect to these questions, elaborate hearings were had and most mature consideration given by the Interstate Commerce Commission. Two views of the meaning of the act were presented, one view being that no exception from the general rule was lawful unless made with the previous sanction of the Commission, and the other that no order of relief from the Commission was required when the circumstances and conditions

were substantially dissimilar; since the carrier, in acting in accordance with them, would commit no breach of the law, although it would be responsible in case it should afterwards be found that the circumstances and conditions were misconceived or misjudged.

On this question the Commission, as then constituted, was unanimous, and Judge Cooley, delivering its opinion, held:

> "We have listened, with an earnest desire to reach a just conclusion, to all the arguments presented on the construction of the statute, by those appearing either to advocate or to oppose the applications, and after mature consideration we are satisfied that the statute does not require that the Commission shall prescribe in every instance the exceptional case and grant its order for relief before the carrier is at liberty in its tariffs to depart from the general rule. The terms of the statute clearly lead to the opposite conclusion. It declares:
>
> " 'It shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of the like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance.'
>
> "Here we have clearly stated what is unlawful and forbidden, and for doing the unlawful and forbidden act penalties are then provided. But that which the act does not declare unlawful

> must remain lawful if it was so before, and that which it fails to forbid the carrier is left at liberty to do without permission from any one. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions, and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the statute is not violated."

This view was sustained by the Supreme Court of the United States in

> Interstate Commerce Commission *vs.* Alabama Midland Ry., 168 U. S., 168.

Under the law, therefore, as it was prior to the amendment of 1910, the carrier possessed the right, without any previous action of the Commission, to charge less for a longer than for a shorter haul, if the circumstances and conditions of the two hauls were substantially dissimilar.

The result of this, of course, was that the 4th section, as it then stood, afforded no relief for those who complained of the smaller charge for the longer distance unless the complaining party should file a petition before the Interstate Commerce Commission, and should obtain an order affirmatively declaring that the circumstances and conditions of the longer haul were

not substantially dissimilar from those of the shorter haul.

When Congress came to the consideration of amendments to this section, in 1910, it had become convinced, justly or unjustly, that the carrier, availing itself of the power of initiation just mentioned, was practically administering all prohibitions as to the smaller charge for the longer distance out of the law. It had become convinced that this was a great evil, and listened with approval to the protest that was made against this power by a considerable portion of the public. It had come to believe that the courts had given such a construction to the section as, in the language of Mr. Mann, "to destroy its life."

It was thought that the general rule on this subject had been wiped out of existence by the initiative of the carriers.

We do not think, however, that by the omission of the words "under similar circumstances and conditions," it was the intention of the act to change the principles of the law which had governed the making of rates.

The Act to Regulate Commerce still provides in its first section that—

> "all charges made for any service rendered or to be rendered in the transportation of passengers or property shall be just and reasonable;"

in its second section that

> "no carrier shall collect or receive from any person or persons a greater or less compensa-

> tion for any service rendered, or to be rendered, in the transportation of passengers or property, than it collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under similar circumstances and conditions,"

and, in section three, that it shall be unlawful for any common carrier, subject to the provisions of the act,

> "to make or give any undue or unreasonable preference or advantage to any particular person, etc., or locality, or any particular description of traffic in any respect whatever."

These provisions of the Act to Regulate Commerce express its substantial and dominating purposes and are to be read into, and to be considered a qualification of, every other provision of the act. This, in effect, was stated, in respect to the requirement of the first section, by Mr. Mann in the debate in the House of Representatives on this subject.

At page 4796 of the Congressional Record, in discussing the question as to whether the discretion created by the proviso of the act was a limited or unlimited discretion, and, therefore, whether or not it was a delegation of legislative power, he says:

> "Remember, whatever the Commission does in respect to this matter, it is always bound by the act of Congress that rates shall be just and reasonable and that railroad companies shall

> not establish unjust and unreasonable rates; so that practically what we do here is to give the Commission power to say what in a particular case shall be a just and reasonable rate, although we declare as a general proposition that it shall be unjust and unreasonable to charge a higher rate for a short haul than for a long haul."

He further stated, when this bill was introduced in the House, and he was making his explanation in respect to it, that there were serious conditions of competition which the law must not undertake absolutely to forbid.

Thus, on page 4795 of the Congressional Record, he says:

> "The intention of the act (the original act) was undoubtedly to provide that in general, as an ordinary proposition, a railroad company could not charge less between two points than it charged between one of those points and a point midway, or part way, between the original two points. In other words, they should not be allowed to run freight from point A through point B to point C, and charge less between A and C than they charge between A and B. And yet water competition seems to prevent a hard and fast rule on that subject, because railroads are necessarily in competition not only with regular passenger and freight steamers, but also with tramp ships on the ocean and on the lakes and rivers, and must compete with these vessels. And it may often happen that the railroad company under the principles which underlie the

making of freight rates cannot afford to make its rate lower than it does between points A and B, and yet can afford to make some profit out of carrying freight at a lower rate between points A and C. That theory controlled Congress when it enacted the original act, and I think no one has ever contended that there may not be cases where, under proper management of railroads, a less charge may be made for a long haul than for a short haul."

Again:

"The Commission may say what is a reasonable rate to different points; but if, in order to get some of the business which otherwise would all go by water, the railroad company wants to carry freight at less than is a reasonable rate on all its business, nobody would wish to prevent it doing that, because to that extent you could lower the rates."

And again, on page 4797, in answer to the question:

"Is it practicable to legislate so as to deprive New York and San Francisco of the benefit of the ocean, that no injustice may be done to the towns inland?"

Mr. Mann said:

"I think not. I think that San Francisco and New York and other ports on the ocean have a natural advantage which cannot, and ought not if it could, be taken away from them. In other words, when you come to the question of fixing freight rates, please remember these propositions: A railroad company must pay its oper-

ating expenses. It must pay the cost of maintenance. It must pay the cost of its general offices. It must pay the interest on its bonds. It must pay, if it is successful, dividends on its stock. It must carry some freight at profit enough to make dividends on the stock.

"It may carry some freight which will help it to pay interest on its bonds, and it may be met by a situation where it can carry a large amount of freight at rates which will more than pay the operating expenses or a proportionate share of the operating expenses, which will more than pay its proportionate share of the cost of maintenance, which will more than pay its share of the cost of the general offices, which will contribute something to the interest on the bonds, but which will not contribute anything towards dividends on the stock or which will not even contribute enough towards the interest on the bonds to pay more than 1 or 2 per cent, whereas the rate would be 4 or 5 per cent. Now, with that large amount of freight which it may get if it competes successfully with other methods of transportation, it is the duty of the railroad company to secure that freight at lower terms than are practicable to pay interest and dividends if it carried all freight on the same basis, and that will be true forever in railroads in competition between New York and San Francisco, competing with ocean methods of transportation, and ought to be so. It is true through many parts of the United States, and ought to be so, because in the end it tends to reduce the rates on freight throughout the country.

* * * * * * *

> "Of course, under existing law, as construed by the courts, the long and short-haul clause amounts to nothing. Under the proposition which we have presented, if enacted into law, there must be application made in special cases to the Commission which grants authority to charge a less amount for the longer distance than for the shorter distance, and we think the power can safely be lodged in the hands of the Commission. It is perfectly patent it must be lodged somewhere. We will never reach a basis in this country, and ought not, with our immense railroad mileage and with our great water carriage, with our long lines of road, where we charge railroad rates on the mileage basis or where we put all classes upon the same basis."

It will thus be seen that there are conditions of competition well recognized by the promoters of this legislation as conditions which the law must not undertake absolutely to ignore or forbid. Most of these illustrations, as given on the floor of the House, were of water competition, but they were not confined to water competition. One of the notable cases, having no reference to water competition, is that of the competition of commodities between the citrus fruits of California and the citrus fruits of Florida in the competing markets of the country, and throughout the debate it was recognized that the economic rule which justifies the smaller charge for the longer haul was not at stake, but that the administration of the law

which, in the judgment of Congress, was faulty, was at stake and must be corrected.

If, therefore, as stated by Mr. Mann on the floor of the House, and as seems to be certainly true, the provision of the first section of the act, requiring all charges made for any service rendered in the transportation of passengers and property to be just and reasonable, must be taken as a qualification of section 4, and must, therefore, qualify the power of the Interstate Commerce Commission under the proviso to permit or forbid a smaller charge for the longer distance, then it will be necessary for the Commission, in passing on applications for this relief, to determine whether, under the circumstances and conditions of the longer and of the shorter haul, the charging of a smaller rate for the longer distance is just and reasonable. In other words, in passing on such applications, it will be necessary for the Commission to determine whether the traffic moves to the longer distance and to the shorter distance, "under substantially similar circumstances and conditions."

Under the law as it was before the amendment, the carrier was entitled to the initiative in determining this question, but its determination might upon application to the Commission be overruled. Under the law as changed, the carrier cannot take the initiative in respect to it, but the question must in the first instance be determined by the Commission. The ques-

tion, however, to be determined in both cases is the same; only the method of determination is altered by the amendment.

This is in line with the policy of Congress in respect to another important matter embraced in the same amendatory act of June 18, 1910. Prior to that act, the carriers could, in all instances, increase their rates without the previous consent of the Commission. The initiative as to increases of rates was, prior to the amendment, completely in the carrier. By the amendment, the Commission was given the discretionary power to deprive the carrier of its rights to initially increase rates and was authorized to inaugurate an investigation, either upon complaint or upon its own motion, for the purpose of determining upon the propriety of proposed increases. The only difference between this last-mentioned case and the case of the long and short-haul clause, is that the carrier is deprived in a qualified way of its power of initiation in respect to increase of rates, while it is deprived absolutely of its power of initiation in respect to the long and short-haul charge; and the Commission is clothed with a discretionary power to assume the initiative in respect to an increase of rates, while it is made its absolute duty, on the application of the carrier, to assume the initiative in relation to the long and short-haul charge.

In this view of the amendment, the statute would confer upon the Commission a power, in respect to

fixing rates for the longer haul, measured by the rule that the rates so fixed shall be just and reasonable under the circumstances and conditions of the longer haul as compared with the circumstances and conditions of the shorter haul, and not an unqualified, uncontrolled, and unmeasured discretion.

It is believed that this is the proper construction of the act. As thus construed, it is believed to be constitutional, notwithstanding the fact that it deprives the carrier of the initiative as to these rates. If the Commission should decide arbitrarily against the application of the carrier for relief, in a case where there existed, as a fact, such substantial dissimilarity of circumstances and conditions as to make the smaller charge for the longer haul just and reasonable, or if the Commission should determine that question erroneously, it is believed that the carrier would have relief in the courts to the same extent that it would have if there was, in a proper case, an arbitrary or erroneous determination by the Commission against the right of the carrier to increase its rates.

In stating the proposition that, as thus construed, the fourth section is constitutional, we have not overlooked the contention, very intelligently made, that the requirement of the act that all rates shall be just and reasonable, is not a sufficient primary standard to prevent the power conferred upon the Commission in this regard from being a delegation of legislative authority, and the further contention that, irrespective

of the sufficiency of the primary standard, the power involves the delegation of legislative power because the Commission's authority cannot be exercised except upon application of the carrier.

In respect to the contention that the primary standard prescribed by the act is not sufficiently definite, it would seem only necessary to refer to the following cases:

Field *vs.* Clark, 143 U. S., 649;
Buttfield *vs.* Stranahan, 192 U. S., 470;
Union Bridge Co. *vs.* United States, 204 U. S., 364;
United States *vs.* Heinszen, 206 U. S., 370;
St. Louis & Iron Mountain Ry. Co. *vs.* Taylor, 210 U. S., 281;
Monongahela Bridge Co. *vs.* United States, 216 U. S., 177.

In these cases enough is stated, in respect to the primary standard, to show conclusively, in my judgment, that the Supreme Court will hold that a requirement that a rate to be authorized by the Commission shall be just and reasonable, is a sufficient primary standard and that an exercise of power by the Commission, under such authority, will not amount to the exercise of legislative power.

In respect to the contention that, irrespective of the sufficiency of the primary standard, the power of the Commission cannot be exercised except upon the ini-

tiative of the carrier in making the application, it is not believed that in the present trend of popular and judicial thought a proposition of this kind, no matter how technically meritorious, will be approved by the Supreme Court. In fact, if the primary standard of determination by the Commission is sufficient, that would seem to end the question of whether or not the delegation of power is legislative; for, if the delegation of power in itself is not the delegation of a legislative power, it could hardly be made so by the method of its exercise. It would seem more pertinent to inquire, in this connection, whether the operation of the law would be equal and uniform, but, as above stated, it is not believed that any constitutional objection would, under current conditions, be upheld. The same relief and the same equality of protection under the law would be open to all alike.

That the foregoing interpretation of this amendment is proper, is strengthened by the consideration that any other construction would render the act unconstitutional.

As said by Mr. Justice White, in delivering the opinion of the court in United States *vs.* Delaware & Hudson Company, 213 U. S., 366, 407-8:

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute

> from constitutional infirmity. Knights Templars Indemnity Co. *vs.* Jarman, 187 U. S., 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. Harriman *vs.* Interstate Com. Com., 211 U. S., 407."

Before proceeding to discuss the question whether, assuming that the above construction is unsound, the clause is valid, it may be well to state certain principles which have been established by the courts as to what are circumstances and conditions which make a lower charge for the longer distance just and reasonable.

From a reference to the adjudicated cases it will be seen that all the substantial facts surrounding a service must be considered in determining whether a charge for it is just and reasonable. In the cases thus far presented, the question of whether or not a lower charge for a longer than for a shorter distance is just and reasonable, has always arisen under a statute which in terms permitted a lower charge for the longer than for the shorter distance if the circumstances and conditions of the service were substantially dissimilar;

but it is held, as in Louisville & Nashville Railroad Company *vs.* Behlmer, 175 U. S., 674, that the determination of the question whether in any case substantial dissimilarity of circumstances and conditions exists, must be made subject to "the absolute command of the statute that all rates shall be just and reasonable."

The decisions, therefore, which hold that all the material facts surrounding the service, including the existence of substantial competition, whether from water carriers or other sources, must be considered, are, in effect, decisions establishing the principle that a rate made lower for a longer than for a shorter haul by substantial competition, is, to the extent that it is influenced by such competition, just and reasonable.

Cincinnati, New Orleans & Texas Pacific Ry. *vs.* Interstate Commerce Commission, 162 U. S., 184;

Texas & Pacific Ry. *vs.* Interstate Commerce Commission, 162 U. S., 197;

Interstate Commerce Commission *vs.* Alabama Midland Ry., 168 U. S., 144;

Louisville & Nashville R. R. *vs.* Behlmer, 175 U. S., 648;

East Tennessee, Virginia & Georgia Ry. *vs.* Interstate Commerce Commission, 181 U. S., 1;

Interstate Commerce Commission *vs.* Louisville & Nashville R. R., 190 U. S., 273;

Interstate Commerce Commission *vs.* Chicago Great Western Ry., 209 U. S., 108.

IF THE FOREGOING CONSTRUCTION IS NOT SOUND, IS THE PROVISION OF THE ACT AS IT NOW STANDS CONSTITUTIONAL?

In addition to the interpretation above given of the amendment of June 18, 1910, one other construction may be suggested. This construction is that the proviso by which authority is conferred upon the Commission to permit the making of a smaller charge for a longer than a shorter haul, amounts to an absolute discretion in the Commission, unlimited by any rule laid down by Congress, and subject to no supervision. It is believed that any such construction of the amendment would make it unconstitutional. It would be either a delegation by Congress to the Commission of power to make rates without providing any rule to be administered by it, or it would be a delegation by Congress to the Commission of authority, in its unlimited, unqualified, and unregulated discretion, to suspend a legislative act of Congress. To do one or the other would involve the exercise of a legislative power by the Commission.

The making of rates is essentially a legislative act.

Prentis *vs.* Atlantic Coast Line R. R., 211 U. S., 226.

The suspension of a law of Congress at the absolute discretion of the officer entrusted with the power, and

not made to depend upon the finding by him of a certain fact, is also the exercise of a legislative power.

Field *vs.* Clark, 143 U. S., 693.

The principle which forbids the delegation by Congress of any part of its legislative power is thus announced by Mr. Justice Lamar:

> "That no part of its legislative power can be delegated by Congress to any other department of the Government, executive or judicial, is an axiom in constitutional law, and is universally recognized as a principle essential to the integrity and maintenance of the system of government ordained by the Constitution."

The same principle is, in the case of Field *vs.* Clark, thus announced by Mr. Justice Harlan, who delivered the opinion of the majority of the court:

> "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

Of course, the same principle applies to any other delegation of legislative power.

The delegation of power by Congress to suspend one of its acts is, when justified at all, universally justified on the ground that the effect of the act is to direct the exercise of the power of suspension upon the ascertainment, by the person to whom the power is delegated, of the existence of a particular fact or state of conditions or circumstances. Union Bridge Co. *vs.*

U. S., 204 U. S., 382. If, therefore, in this case, Congress has established a rule that the rates which the Commission may authorize shall be just and reasonable under the circumstances of the carriage, then the delegation of power to the Commission to first ascertain that fact and afterwards to authorize a rate in accordance with it, is, as heretofore stated, believed to be a valid delegation of power; but if the limitation that rates shall be just and reasonable under the circumstances of the service does not apply to this section, and if Congress has thus fixed no rule for the government of the Commission in this regard, but simply means to delegate its legislative discretion to the Commission without determining the standard of its exercise, it is a delegation of legislative power and is unconstitutional.

Moreover, if the power expressed in this proviso to section 4 is purely arbitrary and is controlled by no regulation or restraint, it is unconstitutional for that reason alone. The very idea that one man may be compelled to hold his property, or any material right essential to its enjoyment, at the mere will or caprice of another, is intolerable in any country where freedom prevails, and is contrary to the Constitution.

Yick Wo *vs.* Hopkins, 118 U. S., 356;
City of Baltimore *vs.* Radecke, 49 Md., 217;
Ex parte Sing Lee, 96 Cal., 354;
City of Sioux Falls *vs.* Kirby, 6 S. D., 62;
City of Richmond *vs.* Dudley, 129 Ind., 112;
State *vs.* Mahner, 43 La., 496.

This last-stated proposition is, however, denied, in respect to the immediate question before us, by the Supreme Court of the United States in Louisville & Nashville R. R. *vs.* Kentucky, 183 U. S., 503; but, for reasons hereinafter stated, it is hoped that this case will not be adhered to by the Supreme Court when the question is presented for further consideration.

In the event that the delegation of power contained in the proviso to the 4th section is unconstitutional, it becomes proper to consider whether the effect of that unconstitutionality is to render invalid the whole of the 4th section, or only the proviso, leaving an inflexible rule forbidding the charging of a smaller rate for the longer distance. This question will now be considered.

IS THE SECTION SEPARABLE, AND WILL THE PROVISO ONLY BE DECLARED INVALID?

It is not believed that the court would hold that the proviso of the section is separable from the other portion of it. As has been hereinbefore noted, Congress, when enacting the original law in 1887, and also in adopting the amendment in 1910, was confronted with the proposition to enact an absolute, inflexible rule on the subject. On both occasions it refused, and deliberately refused, to do so. It can, therefore, in the light of this legislative history, hardly be claimed that Congress would have adopted an absolute rule without

condition, and, if not, the two parts of the statute cannot be considered separable.

Moreover, when the reasons are examined which caused Congress to decline to enact an absolute and inflexible rule, it will be found that they are so potential as to prevent a court from concluding that the two provisions of the statute are separable. It is shown in Judge Cooley's opinion, hereinbefore referred to, that the commerce of the country could not be conducted under an inflexible rule. Thus it was said by Judge Cooley:

> "It was fairly shown before us, that instances exist, and may be found, along the route of petitioner's lines in the States of Kentucky, Tennessee, Georgia, Alabama, Mississippi, and Louisiana, where the competition of water-ways forces down the railroad rates below what it is possible to make them at noncompetitive points and still maintain the roads with success or efficiency. The reason is that the carriers by water can perform the service at very much less cost than the carriers by land. The general fact is that railroad rates for the transportation of property must approximate closely those which are made between the same points by steamer, and the steamer rates are generally, if not invariably, much below what the railroads can afford to accept upon all their business. In such cases, if competition is maintained, more must be charged at interior points than can be obtained at the points of competition; and if the competitive rates are such as are productive of some gain, however slight, the non-competi-

tive points are likely to receive indirect advantage therefrom, while the competitive points have the larger and more direct benefit, and are afforded a choice of agencies in transportation whose rivalry may fairly be expected to keep the cost down to a minimum. The interior points may have no ground for complaint in such a case, provided the rates they are charged are in themselves just and reasonable, even though the fact be that in some cases more is charged for the short than for the long haul over the same line in the same direction. This general fact is recognized the world over; and of English railways it has been often remarked that some of them would be deprived of much of their value if they were not allowed to meet water competition by such concessions at the points of contact as the competition would compel.

* * * * * * *

"Low rates are a necessity of the situation; and if railroads compete with water transportation either on the ocean or the navigable rivers, they have no choice but to accept such rates. To compel the roads to observe strictly the general rule laid down by the fourth section would necessitate their abandonment of some classes of business in which their competition with water transportation is now of public importance."

I Annual Rep. I. C. C., p. 75.

This same view was extended to embrace all classes, whether from water carriers or otherwise, of substantial competition, by the decisions of the Supreme

Court of the United States in the following series of cases:

Cincinnati, New Orleans & Texas Pacific Ry. *vs.* Interstate Commerce Commission, 162 U. S., 184;

Texas & Pacific Ry. *vs.* Interstate Commerce Commission, 162 U. S., 197;

Interstate Commerce Commission *vs.* Alabama Midland R. R., 168 U. S., 144;

Louisville & Nashville R. R. *vs.* Behlmer, 175 U. S., 648;

East Tennessee, Virginia & Georgia R. R. *vs.* Interstate Commerce Commission, 181 U. S., 1;

Interstate Commerce Commission *vs.* Louisville & Nashville R. R., 190 U. S., 273;

Interstate Commerce Commission *vs.* Chicago Great Western Ry., 209 U. S., 108.

It will thus be seen that the economic law, which controls the movement of traffic under the dissimilar circumstances and conditions produced by controlling forces in respect to the longer as compared to the shorter haul, is so well recognized and is so potential that it is not believed that the Supreme Court will hold that the proviso in section 4 is separable from the remainder of the statute.

Of course, if the court should hold that the two portions of the statute are inseparable, then, if the proviso is unconstitutional, the whole section will fall.

If, however, the court should, contrary to this view, hold the two portions of the section separable, and should further hold that the proviso is unconstitutional in that it is an attempt by Congress to confer upon a commission a portion of its legislative power, or in that it is the delegation of an arbitrary, irresponsible, and tyrannical power, then the result would be that the rule forbidding a lower charge for the longer than for the shorter haul, would be absolute and inflexible, and this brings me to the consideration of the question whether an absolute and inflexible rule on this subject would be constitutional.

AN ABSOLUTE AND INFLEXIBLE RULE UNCONSTITUTIONAL.

We are met at the outset, in considering this proposition, by the case of Louisville & Nashville R. R. Co. *vs.* Kentucky, 183 U. S., 503. If that case was rightly decided, or is upon reconsideration adhered to, and is held to be applicable to the act of Congress now under examination, it will, of course, be an end of the controversy.

It should be noted, however, that the opinion in that case is most unsatisfactory and seems to assert propositions of constitutional law which are clearly indefensible.

In its opinion the court seems to consider that the fact that the rule in respect to the long and short haul

clause is contained in the constitution of the State, has some bearing upon the question to be determined. It says:

> "But, apart from such contentions (the contentions referred to being contentions growing out of the contract clause and the commerce clause), and looking only at the case of a company voluntarily formed to carry on business wholly within a State, we are unable to see how such a company can successfully contend that it can be exempted by the courts from the operation of the constitution of the State."

The Louisville & Nashville Railroad Company had been chartered and had been constructed long before the constitution of the State of Kentucky then being considered was adopted, and, therefore, there was no question in the case of the railroad company holding its property rights subject to rules in respect thereto established by a constitution in force at the time of and before they were acquired.

It would seem, therefore, that the proposition of the court just stated would have no relevancy to the question under consideration, unless it were proposed to assert that a property right of a corporation organized under the laws of a State may be violated by its constitutional provisions thereafter enacted, and yet such a proposition is so clearly opposed to all the decisions of the Supreme Court itself, which uniformly hold that a State cannot violate the 14th Amendment to the Federal Constitution by its own constitution any

more than it can by its statutes, or by any other agency of the State, that it seems impossible to suppose that any view of this sort was in the mind of the court.

Railroad Company *vs.* McClure, 10 Wall., 511, 515;

Gunn *vs.* Barry, 15 Wall., 610, 623.

New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650, 672;

Bier *vs.* McGehee, 148 U. S., 137, 140.

That the court was, in its opinion, however, laying some especial stress upon the fact that the provision in question was contained in the State's constitution is emphasized by the following quotation from the court's opinion:

> "When citizens of Kentucky voluntarily seek and obtain a grant from the State of a charter that it takes, holds, and operates its right subject to the constitutional inhibition we are considering, and are without power to challenge its validity."

It seems impossible to suppose that the court intended by this expression to question the right of a railroad company to challenge the validity of the provision of the State constitution referred to, or any other provision of that constitution, if the effect of the challenged provision was to deprive it of its property without due process of law, or to deny to it the equal protection of the laws contrary to the fourteenth

Amendment to the Federal Constitution, and yet why should this reference to the State constitution be made unless it, in the mind of the court, had some efficacy differentiating it from other forms of State action, in relation to the question of whether or not a property right of the railroad company was violated. Does it not seem that the court in making this decision was acting on the theory that the constitution of Kentucky, enacted after the Louisville and Nashville Railroad Company had acquired its property, qualified in some way that company's rights in its property and to some extent deprived the company of its right to the use and enjoyment of its property?

While this would seem to be the necessary consequence of the emphasis laid upon the constitution of the State in the opinion of the court, still the court seems to go on to consider, in a way, whether the right to charge less for a longer than for a shorter haul is a property right protected by the Federal Constitution, but, in determining that question, it gives no reason except that the company holds its property subject to the constitution of the State. It says:

> "What we now say is, that a State corporation, voluntarily formed, cannot exempt itself from the control reserved to itself by the State by its constitution, and that the plaintiff in error, if not protected by a valid contract, cannot successfully invoke the interposition of the Federal courts, in respect to the long and short-haul clause in the State constitution, on the ground simply that the railroad is property."

It would thus seem that the fundamental questions which should have controlled this question were not considered, or certainly were not dealt with in the opinion of the court. Moreover, it should be noted that the reason given by the court in its decision seems to refer the power exercised by the State to the power impliedly reserved in its constitution to deal with corporations organized under its laws. If this be the only reason on which the court acted, it may well be questioned whether the doctrine of that case will extend to an act of Congress exercised in respect to a corporation organized under the laws of a State. However this may be, it seems to me that the decision of the case is manifestly erroneous and withdraws some of the most substantial and valuable property rights, which a railroad company has, from the protection of the Constitution of the United States.

It seems fair to hope that a case so little considered and so inadequately reasoned as the one now under discussion will not, upon further consideration, be adhered to by the Supreme Court of the United States, and will take rank, as an abandoned precedent, with the case of Munn *vs.* Illinois, 94 U. S., 113, which was, in effect, overruled by the Supreme Court in Wabash R. R. *vs.* Illinois, 118 U. S., 557, and other cases.

Moreover, it must be remembered that the system of governmental regulation has been greatly developed and advanced since 1902, when this case was decided. Legislation on the subject has step by step been pressed

further and further, until it has assumed an importance at this day hardly realized or appreciated ten years ago. In this view of the larger place which governmental regulation has assumed as a matter of fact in our governmental institutions, it would seem proper that principles announced in the early stages of governmental regulation should, in view of their importance and of their far-reaching consequences, be now reviewed by the courts, unembarrassed by precedents which were established at a time when comparatively little attention had been paid to this subject and its underlying principles had not been given thorough and scientific examination. It therefore seems to me that, in respect to no question possessing such fundamental and far-reaching consequences in its influence upon our institutions and upon our constitutional rights, should we feel it is improper to ask or unjustifiable to expect a thorough and scientific re-examination of the principles on which previous decisions have rested.

It is, therefore, proposed to re-examine this question on principle, unembarrassed by a consideration of the precedents which have been made.

This would seem to be especially justifiable where the principles asserted in respect to governmental regulation involve consequences so far reaching as practically to involve throughout the country the success or failure of railroad operations in private hands, and, consequently, the success or failure of private owner-

ship of railroad property. In respect to this long and short haul clause, it must be noted that an inflexible rule established by Congress, forbidding a lower charge for the longer haul, would, if valid, as shown by statistics offered by the Louisville & Nashville Railroad Company to the Interstate Commerce Commission some years ago, deprive that company of one-third of its entire freight traffic, and it is now estimated, by competent authority, that the rule in question would involve a deprivation of the carriers in southeastern territory of at least forty per cent of their freight traffic. When these enormous figures are considered, the criticism of the Kentucky case hereinbefore mentioned, made by the Hon. Charles G. Washburn, of Massachusetts, on the floor of the House, when this clause was under consideration, becomes all the more striking. He said:

> "The Kentucky law applied to perhaps one-fourth of the railroad business in the State. The mileage of railroads in Kentucky was about one and one-half per cent of the total mileage of the United States. We may say, therefore, roughly speaking, that the business to which the Kentucky long and short haul law applied, was less than one-half of one per cent of the total business of the railroads in the United States."
>
> Record, p. 4993.

A court, out of deference to local conditions in a State, and actuated by a desire to uphold the State's

laws, might possibly view with unconcern an effect so comparatively trivial on the business of the country, but would feel it necessary to re-examine the question if brought face to face with ruinous consequences to so large a portion of the business of the transportation companies as would be subject to the operation of this law of Congress.

In view of these immense consequences, we feel justified in re-examining this question on principle.

In pursuing this inquiry, there are certain fundamental propositions which do not seem, either in the light of reason or in the light of authority, to be open to question.

It seems to be beyond question that the use of property is property, and that to deprive a carrier of the use of its property is to deprive it of the property itself. This is not only true in fact, but has been repeatedly held by the Supreme Court.

Thus it was said by that court in Chicago, Milwaukee & St. Paul Railway Co. *vs.* Minnesota, 134 U. S., 458:

> "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to re-

> ceive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

And in Cleveland, etc., *vs.* Backus, 154 U. S., 445, it is said:

> "The value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use."

And in Monongahela Navigation Co. *vs.* United States, 148 U. S., 328, the court says:

> "The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner."

Again:

> "For each separate use of one's property by others, the owner is entitled to a reasonable compensation, and the number and amount of such uses determines the productiveness and the earnings of the property, and therefore, largely its value."

The same doctrine is stated in the case of *In re* Marshall, 102 Fed., 323, where it is said:

> "The constitutional guaranty, said the Court of Appeals of New York in *Re* Jacobs, 98 N. Y., 105, that no person shall be deprived of property without due process of law, may be violated without the physical taking of property for pub-

> lic or private use. Property may be destroyed or its value may be annihilated. It is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived, and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."

It would seem, therefore, unquestionable that every owner of property has a property right, protected by the Constitution, to use it in every legitimate way.

It would seem equally certain that the use of property which is inherently proper and in the public interest, cannot be made illegal by a statute, for, if it could be thus made illegal, all that a legislature would have to do in order to confiscate property would be to declare illegal all uses to which it might be put, and, by force of such statutory declaration, the owner of the property would be effectively deprived of all protection from the Constitution. That a statute cannot make a use of property illegal which is wholly proper, is shown by innumerable decisions of the Supreme Court of the United States. For example, many of the States have passed laws declaring that it shall be illegal for railroads to use their property for more than a certain designated rate. The Supreme Court has repeatedly held that this legislative declaration of what would be illegal did not make it illegal con-

trary to the fact, because a property right was involved and the effect of such holding would be to deprive the carrier of the beneficial use of its property, in violation of the Constitution. This same proposition is established by all the cases defining the proper scope and use of the police power.

In respect to this, I print in the appendix, as Appendix A, a valuable note made by my assistant, Mr. John K. Graves.

It is a sound principle of economics, and is admitted by both the Interstate Commerce Commission and by the Supreme Court of the United States, that, in no case where substantial competition exists, can a railroad property be used except in recognition of, and in obedience to, the law of competition. As the chairman of the committee, who introduced the original Interstate Commerce Bill, stated on the floor: "It (the law of competition) is stronger than any law we can make."

Thus it is stated by Judge Cooley:

> "Low rates are a necessity of the situation, and if railroads compete with water transportation, either on the ocean or on the navigable rivers, they have no choice but to accept such rates. To compel the roads to observe strictly the general rule laid down by the fourth section would necessitate their abandonment of some classes of business in which their competition with water transportation is now of public importance."

And again:

> "The fact still remains that they must either be allowed to compete with vessel owners and make low charges for the purpose, or they must leave vessel owners in possession of the business without the check upon charges which competition would afford."

This same view is approved by the Supreme Court of the United States. It says:

> "It must also be conceded that the defendant would lose the foreign traffic, by reason of the competition referred to, and the revenue derived therefrom, unless it carries at the lower rates and by so doing is enabled to get part of it."
>
> Texas & Pacific Ry. Co. *vs.* Interstate Commerce Commission, 162 U. S., 236.

This is also apparent from the following decisions of the Supreme Court:

Interstate Com. Com'n *vs.* Alabama Midland Ry. Co., 168 U. S., 144;

Louisville & Nashville R. R. Co. *vs.* Behlmer, 175 U. S., 653;

East. Tenn., etc., Ry. Co. *vs.* Interstate Com. Com'n, 181 U. S., 1.

It is likewise true that this use of a carrier's property, in accordance with and in obedience to an irresistible law of economics, is right in itself and is in the interest of the public.

In connection with this view of the subject, the following expressions from Judge Cooley in the Louisville & Nashville case, examined by the Commission in 1887, are of interest:

> "Every railroad company ought, when it is practicable, to so arrange its tariffs that the burden upon freights shall be proportional on all portions of its line and with a view to revenue sufficient to meet all the items of current expense, including the cost of keeping up the road, buildings, and equipment, and of returning a fair profit to owners. But it is obvious that, in some cases, when there is water competition at leading points, it may be impossible to make some portion of the traffic pay its equal proportion of the whole cost. If it can then be made to pay anything toward the cost, above what the taking of it would add to the expense, the railroad ought not, in general, to be forced to reject it, since the surplus, under such circumstances, would be profit. As has been tersely said by M. de la Gournerie, formerly inspector-general of bridges and railways in France, a railroad 'ought not to neglect any traffic of a kind that will increase its receipts more than its expenses'; and long-haul traffic which can only be had on these terms may sometimes be taken without wronging any one, when, to carry all traffic, or even the major part of it, at the like rates, would be simply ruinous. But we desire to apply generally to every kind of competition herein discussed the observation above made, that when competition leads to the transportation of property below actual cost, fairly com-

> puted, it ceases to be legitimate. Fair and reasonable competition is a public benefit; excessive and unreasonable competition is a public injury. Competition is to be regulated, not abolished. The other sections of the law of themselves imply ample authority for its regulation, and, in connection with the fourth section, support the interpretation that it is wholly inadmissible to press competition to a point where expenses are increased beyond the increase of income."

And in one of the quotations above made from this same opinion it is shown that—

> "to compel roads to observe strictly the general rule laid down by the fourth section would necessitate their abandonment of some classes of business in which their competition with water transportation is now of public importance."

And as is said by the Supreme Court:

> "It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that they seek, by the charges they make, to secure it, operates in the interests of the public."
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> Texas & Pacific Ry. Co. *vs.* Int. Com. Com., 162 U. S., 218.

The main fact which makes the participation of the rail carrier in this competitive traffic to the interest of the public is that, if a carrier is excluded from any

material portion of traffic which pays a margin of profit, then the loss which such exclusion involves must be put on the remaining portion of its traffic and increase the cost to the public interested in such remainder.

This fact is thus stated by Justice White, in the case of East Tennessee, etc., Ry. Co. *vs.* Interstate Commerce Commission, 181 U. S., 20:

> "Applying the principle to which we have adverted to the condition as above stated, it is apparent that if the carrier was prevented under the circumstances from meeting the competitive rate at Nashville, when it could be done at a margin of profit over the cost of transportation, it would produce the very discrimination which would spring from allowing the carrier to meet a competitive rate where the traffic must be carried at an actual loss. To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, without anywise benefiting the public."

In view of the foregoing considerations, and of all the decisions of the Supreme Court, the following principles may be stated as true, as self-evident and as fundamental:

First. That the use of property is property within the meaning of the Fifth Amendment to the Constitution;

Second. That a use of property is legitimate which is in accordance with, and in obedience to, a fair rule of trade and an irresistible law of economics;

Third. That such use is not only proper and legitimate in itself, but is in the interest of the public;

Fourth. That such use cannot be taken away from a carrier by legislation of Congress without a violation of the Fifth Amendment to the Constitution.

The case may be stated thus:

A carrier, in accordance with the law, has constructed a railroad between two competitive points through a number of non-competitive points. It is not the short rail line. It is in competition with water carriers on the ocean which are not subject to the Act to Regulate Commerce. It is subject to the controlling competition of short line rail carriers. It is subject to controlling competition of commodities and of markets. It seeks to participate in competitive traffic and to make a rate between its competitive points lower than to intermediate points, which gives to it some margin of profit and which is made necessary by the competitive conditions. All its rates to intermediate non-competitive points are reasonable in and of themselves. The circumstances of the service between the competitive points so differ from the circumstances of the service

to intermediate non-competitive points that the difference in charge "is in exact conformity with the difference of circumstances." In such a case could Congress prevent the carrier from carrying between the two competitive points at the rate mentioned?

In considering this question it must be remembered that Congress, in the language of Judge Cooley, has studiously omitted to bring the steamboat and other independent water lines within its control and must, therefore, have contemplated and approved the continuance of that kind of competition.

It is likewise spending millions of dollars annually of the public money in the improvement of rivers and harbors for the purpose of making such competition more substantial and effective.

Under the act, likewise, the rate in question is permitted and is possible over the shorter line of railroad. Moreover, the rate is necessary to the carrier in question because of economic conditions produced at competitive points by competition of products and competition of markets. If, under these circumstances, the carrier can be prevented from carrying between the two competitive points at the rate proposed, it is in effect prevented from using its property at all between those points. It is certainly prevented from using it in fair recognition of, and in obedience to, a controlling economic law, which Congress does not undertake to alter or destroy, but the application of which to the conditions supposed, it is, by appropri-

ations from the public treasury, fostering and building up. If, therefore, Congress has the constitutional power to prevent this legitimate commercial use of property, it has in practical effect the power of confiscation.

The only alternative to this consequence would be to say that Congress does not prevent the use of the carrier's property between two competitive points at a competitive rate, but in such case only requires that the intermediate rate should be made no higher. This, however, in the case supposed, would simply shift the method of confiscation. While permitting the carrier to participate in the competitive traffic at the rates found necessary to such participation, and thus not confiscating that use, the effect would be to deprive the carrier, in the case supposed, of the right to charge reasonable, and not unduly discriminatory rates, to intermediate points. This latter right is a right of property as distinctly as the other, and in preventing the use of the property at intermediate points at reasonable rates Congress would be taking away from the carrier a legitimate use of its property.

In reaching this conclusion, I am not forgetful of the fact that the decisions thus far have made the criterion of confiscation to be a fair return upon the carrier's property, and have not yet adopted as a criterion a fair compensation for each individual service. In respect to this, however, it should be remarked again that the extent of governmental regulation has

become so far reaching, and both its extent and its limitations so important, that the principles which have heretofore been announced in respect to it are legitimately entitled to a re-examination in the light of the greater governmental authority which is claimed.

On principle it is true, as has been announced by the Supreme Court, that—

> "If a company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself" (Chicago, Milwaukee & St. Paul Railway Co. *vs.* Minn., 134 U. S., 458); and that—
>
> "for each separate use of one's property by others, the owner is entitled to a reasonable compensation, and the number and amount of such uses determines the productiveness and the earnings of the property, and, therefore, largely its value" (Monongahela Nav. Co. *vs.* United States, 184 U. S., 328).

In other words, a carrier has a right to do business; it has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny it such reasonable compensation and may not interfere simply because out of the multitude of its transactions the amount of its profits is large.

The rule by which the value of all other property than that subjected to a public use is arrived at is to ascertain its reasonable earning capacity, and, by capitalizing that, to ascertain the property value.

The rule heretofore acted on by the courts, in respect to properties subjected to a public use, is that the value of the property must be first arrived at, and from that deduce its reasonable earning capacity. An arbitrary reversal of the method applicable to all other property, whether by legislative authority or by judicial decree, is, as applied to this one class of property, a manifest deprivation of a valuable interest in property, as well as a denial of the equal protection of the laws. There can be no difference between property devoted to a public use and other private property except such difference as is measured by the legitimate consequences of the public use. The interest of the public, in the property of a carrier and in its transactions, can only be that the carrier shall not charge more for a service than a reasonable compensation therefor; that it shall not unduly discriminate as between persons or localities or commodities, or subject any of them to undue prejudice or disadvantage, and that its facilities shall be adequate. Every power of regulation asserted by the Government, in respect to private property subject to a public use, must be measured and tested by whether or not it legitimately tends to secure one or other of these results. If the carrier

performs faithfully these three duties, then, subject to them, its property is its own and is beyond the reach of governmental interference. In other words, when the thing is done that is required by the Act to Regulate Commerce to be done by the Commission, namely, when there is a determination, in the language of the first section, that the rate of the carrier is just and reasonable for the service rendered, and, as required by other sections, that there is no unjust discrimination as between persons or localities or commodities, then there exists a property right in the carrier to charge and receive this reasonable rate, and its right to do so cannot be taken away or affected by the amount of the return upon its property. It may be that it cannot make a reasonable return on its property by charging reasonable rates. If so, the Government need not and cannot give it that power. It may be that, by reason of favorable and wise design and good management, it is able, by charging a reasonable rate for each of its services, to make a large profit on the amount invested. This profit in every one of its factors is beyond the reach of governmental power, and is the private property of the owners.

If the subject be viewed from another standpoint the result is the same.

Let us suppose a case where the return upon a property is not more than a reasonable return on the amount invested, and let us suppose that this return results from a system of rates, some of which are too

low and some of which are too high. In such a case the carrier cannot justify those that are too high by showing that the average is right, for that would be throwing unjustly on the class of traffic bearing the rates which are too high a burden unjustly taken from the other class of traffic on which the charges are unduly low. The Government could not maintain or require rates that are too low for the service on the ground that other rates of the carrier are too high, and that the average makes only a proper return upon the property, for that would be creating an unlawful discrimination between the two classes of traffic to the prejudice of those that were charged too much. It is, therefore, manifest that any philosophic and just regulation of this subject, in which the interests of the public are duly preserved, and in which the property rights of the carrier are duly respected, must arise from a proper and just adjustment of each rate to each service. This necessity grows out of the nature of the situation.

It is no answer to say that it is difficult to determine what is a reasonable compensation for the service. This very thing is required of the Interstate Commerce Commission by the Act to Regulate Commerce whenever the reasonableness and justice of a rate is brought to its consideration. The statute requires it to determine whether that rate is just and reasonable for the service. It is manifestly impossible, in respect to any individual rate, for the Commis-

sion to be guided by the value of the property and the total returns therefrom. It is not denied that the determination of the question of reasonableness is difficult, but the application of a false standard is never justified by the difficulty of applying the true one, and in this connection it is apparent that Congress itself has applied the true one in the Act to Regulate Commerce. If the law-making body can ascertain and declare what rate is reasonable, there is no reason why the courts, with methods at least equally adequate, should not be able to do so. The suggestion made in this note is not as to the application of a new standard, but merely that, when the standard created by Congress itself in respect to the powers of the Interstate Commerce Commission is applied, the result of the proper application of that standard is to bring the case within the protection of the Constitution, and not to give it merely a statutory sanction. Whether or not the Commission has done this in any case is a judicial question.

In respect to the difficulty of the application of this standard, it must likewise be remembered that it is no more difficult to apply the test of reasonableness to a rate than it is to apply it to most other services. The whole principle of *quantum meruit* at the common law is built up on the necessity of determining, by courts and juries, what is reasonable, and the same test of what is reasonable in respect to any other service would apply in the determination of what is reasonable

in respect to the service of a carrier. The test of usage, the test of comparison, the test of expert opinion, the test of effect upon commerce and upon the proper distribution of burdens and advantages between all interested, and other tests which might be enumerated, would apply to and determine the question of reasonableness in such a case.

As interesting in this connection, I print in the appendix, as Appendix B, an extract from a recent address of Mr. W. W. Finley, President of Southern Railway Company.

The foregoing considerations seem to justify the conclusion that an inflexible rule forbidding a smaller charge for the longer distance, notwithstanding the fact that the smaller charge for the longer distance would be justified by the laws of trade and necessitated by economic forces, would be an unconstitutional invasion of the property rights of the carrier.

If this be true, and if likewise true that an unrestricted and unmeasured discretion in the Commission would be an unconstitutional delegation of legislative power, then it would seem that the only constitutional interpretation of the fourth section as amended would be that given in the first part of this paper, and it is believed that the interpretation there given is the proper construction of the law.

Respectfully submitted.

ALFRED P. THOM.

WASHINGTON, D. C., February, 1911.

APPENDIX A.

THE FEDERAL LONG AND SHORT HAUL CLAUSE AND THE FIFTH AMENDMENT.

Notes by JOHN K. GRAVES.

Mr. THOM:

The question submitted is, whether, assuming that the long and short haul clause (Clause 4 of the Act to Regulate Commerce) gives the Commission arbitrary power to allow or refuse to allow the carrier to charge less for the haul to the longer distance destination than for the haul to the shorter distance point, even though controlling competition exist at the longer distance point, the clause, as so construed, violates the Fifth Amendment to the Constitution of the United States.

There will not be considered in these notes any question with respect to the effect of any action of the Commission under the clause, as resulting in an inadequate return to the carrier upon the value of its entire property; and the short-haul rate will be assumed to be reasonable. Also, no question is raised as to delegation of legislative power. "The clause" as hereinafter used, without explanation, will mean the Federal long and short haul clause construed as above indicated.

The question put seems to resolve itself into whether Congress can enact a rigid long and short haul clause. The clause would give the Commission arbitrary and

discretionary power in the premises, which means that there could be no review of its action in the courts. Whether, under the Minnesota case in 134 U. S., such an enactment could stand, depends upon whether the constitutional rights of the carrier could be taken away by any action of the Commission which the clause gives it the power to take. The clause empowers the Commission to refuse to allow the carrier to charge less to the longer distance point, though controlling competition exists there, and though the shorter distance rate is reasonable in and of itself, thus inevitably depriving the carrier of traffic to the longer distance point. If such an exercise of power by the agent of Congress violates the Fifth Amendment, then the act authorizing such exercise of power must fall. It will not do to undertake to save the act, as did the Kentucky Court of Appeals in the case of Louisville & Nashville Railroad Co. *vs.* Commonwealth, 51 S. W., 164, where, in defending the Kentucky constitutional provision (which is identical with the Federal long and short haul clause as it was before the recent amendment) against the charge that it violated the Fourteenth Amendment if controlling competition at the longer distance point were held (as it had been by the Kentucky courts) not to create dissimilar circumstances, the court sustained the provision on the theory that the Commission was empowered to make any exception that it desired, and that it was not to be supposed that it would do injustice to the carrier. If the exercise of the discretion reposed in the Commission could in any case deprive the carrier of its constitutional rights, then the Kentucky constitutional provision should have been wiped out, as authorizing an invasion of the carrier's constitutional rights without recourse to the refuge of the courts, if the Minnesota

case is still of any efficacy and if this land can still boast a government of laws, not of men.

If the Supreme Court was right in condemning the statute in United States *vs.* Reese, 92 U. S., 214, 221, where Chief Justice Waite remarked that,

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large,"

an act of Congress giving free rein to an administrative body not capable of affording due process of law to take away property rights must be condemned.

The question to be determined is, then, Would a rigid long and short haul clause enacted by Congress deprive the carrier of its property in violation of the Fifth Amendment?

There is a decision proper to notice in 183 U. S. (p. 503)—Louisville & Nashville R. Co. *vs.* Kentucky—involving the validity, under the Fourteenth Amendment, of the Kentucky constitutional provision, which is identical with the Federal clause as it existed prior to the recent amendment. As hereinbefore indicated, the Kentucky courts had excluded controlling competition at the long distance point as a circumstance creating dissimilarity of conditions. The Supreme Court upheld the clause as thus construed, saying (p. 514):

> "The evil sought to be prevented was the use of public highways in such a manner as to prefer, by difference of rates, one locality to another, and the remedy adopted by the State was to declare such preferences illegal, and to prohibit any person, corporation, or common carrier from resorting to them.

> That remedy included in its scope every one, without distinction, whose calling, public in its character, gave an opportunity to do the mischief which the State desired to prevent. The practical inefficiency of this remedy to reach the desired end, and the resulting injury to the welfare of both the producers and the consumers of an article like coal, when brought into competition with coal brought from without the State, are strongly urged in behalf of the plaintiff in error; but, however well founded such objections may be, they go to the wisdom and policy of the enactment, not to its validity in a Federal point of view."

Let us suppose that the principles involved did not receive that careful consideration which their importance demanded and examine those principles in the light of reason and the other decisions of the courts.

In the first place, the clause may be assumed to be within the general bounds of the powers conferred on Congress by the commerce clause. It seems clear that the purpose of the enactment is to destroy and prevent discrimination, and that that is its only purpose. See the Kentucky case in 183 U. S., *supra;* Texas & Pacific Ry. Co. *vs.* Interstate Commerce Commission, 162 U. S., 184, 197. It cannot be denied that such purpose is a proper one.

The validity, then, of the clause will depend upon the answer to the question, Is the enactment reasonable, or is it arbitrary?

In order for an act to successfully meet this test, it must be adapted to the accomplishment of the end sought (it having been assumed that its purpose is

legitimate), and in accomplishing such end, the results must not be so destructive as to plainly and decisively outweigh the good it is calculated to do. The more important the accomplishment of the purposes of an act, and the better adapted the act is to accomplish such purposes, the more incidental damage it may do without thereby overstepping constitutional bounds.

In McCulloch *vs.* Maryland, 4 Wheat., 316, 421, 423, Chief Justice Marshall declared:

> "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are *appropriate*, which are *plainly adapted* to that end, which are not prohibited, but consist with the letter and spiri of the Constitution, are constitutional."

Again:

> "Where the law is not prohibited, and is *really calculated* to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

Interstate Commerce Commission *vs.* Brimson, 154 U. S., 447, illustrates the principle that legislative enactments to be sustained must be designed to ac-

complish the proper ends of government and must in fact be adapted to the accomplishment of such ends. In that case the court declared that the prohibition of discriminations in the matter of interstate rates was a proper exercise of the power of Congress under the commerce clause, and that the provisions of section 12 of the act, empowering the Commission to inquire into the management of the business of carriers subject to the act, and to subpœna witnesses to testify concerning the subjects involved in the act, were "plainly adapted to the objects intended to be accomplished."

"Interpreting the Interstate Commerce Act as applicable," said the court, "and as intended to apply, only to matters involved in the regulation of commerce, and which Congress may rightfully subject to investigation by a commission established for the purpose of enforcing that act, we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly or indirectly, imposed upon it by means of unjust and unreasonable discriminations, charges, and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principle of constitutional law that 'the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any *appropriate* means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.' 4 Wheat., 316, 409."

Where the enactment, although its purpose may be

to promote the interests of the public, is so destructive of individual rights as plainly to outweigh the supposed advantages accruing from its operation, the courts will strike it down. A good illustration of this is found in the cases on rate regulation. Whatever may be the true theory with respect to Government control over railroad rates, the theory that is now and has for a long time been applied by the courts is that where an enactment fixing rates reaches the point where the carrier is not allowed an adequate return upon the value of its property, such enactment is considered not to be a regulation adapted to the accomplishment of a proper public purpose, and is regarded as confiscatory. This is practically the application of the principle of reasonableness.

In Railroad Commission Cases, 116 U. S., 307, Chief Justice Waite said that—

> "under *pretense* of regulating fares on trains the State cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to the taking of private property for public use without just compensation or without due process of law."

In the Reagan case (154 U. S., 362, 399) it was declared that

> "it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the *form* of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property."

In Smyth *vs.* Ames, 169 U. S., these cases are referred to by the court, and it again declares that the Federal Constitution forbids legislation, "in whatever *form* it may be enacted," by which a person's property is taken from him without compensation, and that "the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of *unnecessary* and uncompensated taking or destruction of any private property legally acquired and legally held."

Thus, if a rate-fixing statute goes beyond the limit of regulation, it ceases to be adapted to proper governmental purposes, and is condemned as an arbitrary interference by the Government with property rights.

In Lochner *vs.* New York, 198 U. S., 45, the Supreme Court struck down a statute of New York providing that employees in bakeries should not be required or permitted to work more than 10 hours a day, the court saying (pp. 56-57):

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before

this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

"This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? And that question must be answered by the court"

Again (pp. 57-8):

"It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, *as a means to an end*, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general

right of an individual to be free in his person and in his power to contract in relation to his own labor."

Again (p. 61):

"Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless, there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed."

In Atlantic Coast Line R. Co. *vs.* North Carolina Corporation Commission (Selma Connection Case), 206 U. S., 1, the Supreme Court (per Justice White) said (p. 20):

"As the public power to regulate railways and the private right of ownership of such property coexist and do not the one destroy the other, it has been settled that the right of ownership of railway property, like other property rights, finds protection in constitutional guaranties, and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process

and equal protection clauses of the 14th Amendment."

The court upheld the statute, although it was shown that the operation of the train would not be profitable, saying (p. 27):

> "Of course the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria (*sic*) to be taken into view in determining the reasonableness of the order, but it is not the only one."

See Missouri Pacific R. Co. *vs.* Kansas, 216 U. S., 262; Interstate Commerce Commission *vs.* Northern Pacific R. Co., 216 U. S., 538.

In C., B. & Q. R. Co. *vs.* Drainage Commissioners, 200 U. S., 561, where an act of Illinois under which the railroad was required to rebuild its bridge over a creek, made necessary by its enlargement by the Drainage Commission, was upheld by the Supreme Court, the court thus laid down the principle governing the case (p. 592):

> "The validity of a police regulation, whether established directly by the State or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose."

It clearly appears from the foregoing cases that if a rigid long and short haul clause is arbitrary and unreasonable because not adapted to effect a legitimate public purpose, or because so burdensome upon

the carrier as decisively to outweigh any advantage that may accrue to the public from it, it must be condemned. Let us, then, inquire whether the clause is adapted to the accomplishment of legitimate public objects, or whether it cannot be considered as so adapted because arbitrarily interfering with the property rights of the carrier.

The construction originally put upon the long and short haul clause by the Commission denied the efficacy of competition at the longer distance point with other carriers subject to the Act as producing a dissimilarity of circumstances authorizing a lower rate to the longer distance point. This construction of the Act was demolished by the Supreme Court. Cincinnati, N. O. & T. P. R. Co. *vs.* Interstate Commerce Commission, 162 U. S., 184; Texas & Pacific Railway Co. *vs.* Interstate Commerce Commission, 162 U. S., 197; Interstate Commerce Commission *vs.* Alabama Midland R. Co., 168 U. S., 144; Louisville & Nashville R. Co. *vs.* Behlmer, 175 U. S., 648.

In overruling the position taken by the Commission, the Supreme Court in effect declared that it was unable to adopt a construction of the Act that would interfere with and destroy commerce and unnecessarily interfere with the business of the carriers.

Texas & Pacific R. Co. *vs.* Interstate Commerce Commission, *supra,* involved the validity of an order of the Interstate Commerce Commission requiring the defendant company to desist from carrying import traffic from port to destination at a less rate than it carried inland traffic between such points. While the case involved the construction of section 3, the principles laid down are equally applicable to section 4. Indeed, the purposes of the entire Act were reviewed by the court. At page 211, the court (by Justice Shiras) said:

"So, too, it could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had money invested in the railroads of the country, nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation."

Again, on page 218:

"We think that Congress has here pointed out that, in considering questions of this sort, the Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that they seek, by the charges they make, to secure it, operates in the interests of the public."

Again (p. 219):

"Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The

> very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation, or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act."

On page 222 the court declared that the order of the Commission created the very discrimination which it was the object of the act to destroy:

> "The effort of the Commission, by a rigid general order, to deprive the inland consumers of the advantage of through rates, and to thus give an advantage to the traders and manufacturers of the large seaboard cities, seems to create the very mischief which it was one of the objects of the act to remedy."

The court reviewed the English cases arising out of the English act from which section 3 of the Act to Regulate Commerce was taken. It called attention to the decision in Phipps *vs.* London & Northwestern Railway, 2 Q. B. D., 1892, 229, where a violation of the long and short haul principle, caused by controlling competition at the longer distance point, was claimed to constitute an undue discrimination. The following language of Lord Herschell is quoted:

"Of course, if the circumstances so differ that the difference of charge is in exact conformity with the difference of circumstances, there would be no preference at all."

The court approves the language of Lord Selborne, in Denaby Main Colliery Company *vs.* Manchester, etc., Railway Co., 3 Railway and Canal Traffic Cases, 426, where he said:

"It is said that it is unfair to the trader who is nearer the market that he should enjoy the full benefit of the advantage to be derived from his geographical situation at a point on the railway nearer the market than his fellow-trader who trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed that he has two competitive routes is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market. Why the local situation in regard to its proximity to the market is to be the only consideration to be taken into account in dealing with the matter as a matter of what is reasonable and right as between the two traders, I cannot understand. * * * One class of cases, unquestionably intended to be covered by the section, is that in which traffic from a distance, of a character that competes with traffic nearer the market, is charged low rates, because unless such low rates were charged, it would not come into the market

at all. It is certain, unless some such principle as that were adopted, a large town would necessarily have its food supply greatly raised in price. So that, although the object of the company is simply to get the traffic, the public have an interest in their getting the traffic and allowing the carriage at a rate which will render that traffic possible, and so bring the goods at a cheaper rate, and one which makes it possible for those at a greater distance to compete with those situate nearer to it. * * *

"Suppose that to insist on absolutely equal rates would practically exclude one of the two railways from the traffic, it is obvious that these members of the public who are in the neighborhood where they can have the benefit of this competition, would be prejudiced by any such proceedings. And, further, inasmuch as competition undoubtedly tends to diminution of charges, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this act of Parliament not being so used as to destroy a traffic which can never be secured but by some such reduction of charge, and the destruction of which would be prejudicial to the public by tending to increase prices."

In this case the court goes on record to the effect that an enactment causing a rigid equality of rates, though the circumstances are dissimilar, is not adapted to preventing or destroying undue discrimination, and is not in the interests of the public. It also clearly recognizes the fact that such an enactment would be

destructive of commerce and of the interests of the carriers engaged in such commerce.

In East Tennessee, etc., R. Co. *vs.* Interstate Commerce Commission, 181 U. S., 1, where Justice White delivered the opinion, the question was whether the defendant violated the long and short haul clause by carrying traffic from eastern points to Nashville through Chattanooga at a rate less than the rate to Chattanooga, the lower rate for the longer distance being induced by competition with other carriers at Nashville. The court reaffirmed its previous ruling on the question, and declared, in effect, that a contrary decision would not relieve the discrimination as against Chattanooga, and that in fact there could not be said to be discrimination by the carrier, since the conditions causing lower rates to Nashville were beyond its control. On page 18 the court said:

> "In a supposed case when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply. The prohibition of the third section, when that section is considered in its proper re-

lation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the Behlmer case, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is the cause of the preference, and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition *would not remove the discrimination.*"

The court also pointed out that unless the carrier were permitted to make a lower rate to Nashville it would be deprived of the Nashville business. On pages 18-19 the court said:

> "The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive

place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it. We say seemingly on the one hand and apparently on the other, because in the supposed cases the preference is not 'undue' or the discrimination 'unjust.' This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge. Indeed, the findings of fact made by the Commission in this case leave no room for the contention that either undue preference in favor of Nashville or unjust discrimination against Chattanooga arose merely from the act of the carriers in meeting the competition existing at Nashville. The Commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect the traffic at the reduced rates over other lines. From this it follows that, even though the defendant carriers had not taken the dissimilarity of circumstance and condition into view, and had continued their rates to Nashville just as if there had been no dissimilarity of circumstance and condition, the preference in favor of Nashville growing out of the conditions there existing would have remained in force and hence the discrimination which thereby arose against Chattanooga would have likewise continued to

exist. In other words, both Nashville and Chattanooga would have been exactly in the same position if the long and short haul clause had not been brought into play."

Again, on page 20, the court points out that to construe the clause as preventing the carrier from making a lower rate to Nashville would not only not prevent but would create discrimination, and emphasizes the proposition that such a construction of the statute would not benefit the public, while driving the carrier out of the competitive business. After limiting its doctrine as follows:

> "Take a case where the carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency towards unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places."

The court said:

> "Applying the principle to which we have adverted to the condition as above stated, it is apparent that if the carrier was prevented under the circumstances from meeting the competitive rate at Nashville, when it could be done at a margin of profit over the cost of transportation, it would produce the very discrimination which

> would spring from allowing the carrier to meet a competitive rate where the traffic must be carried at an actual loss. To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, without anywise benefiting the public."

Coming down through the decisions of the Supreme Court above cited on this question, we find that the court consistently takes the position that it cannot be supposed that Congress intended the disastrous consequences to carrier and public alike of construing the act as it had been originally construed by the Commission.

From these decisions it would appear that the clause cannot be saved by regarding the matter as dealing with a matter wholly within the discretion of the legislature, as it was treated in C., B. & Q. R. Co. *vs.* Anderson (Neb.), 101 N. W., 1019, in a seemingly ill-considered opinion. A contrary conclusion was reached by the Circuit Court for the District of Oregon, in *Ex Parte* Koehler, Receiver, 23 Fed., 529, which came up upon an application of the Receiver for instructions as to whether his company should obey a statute of Oregon fixing the charges for carrying property, and providing: "No greater rate shall be charged for carrying similar property a short haul than a long haul in the same direction." That part of the opinion dealing with the long and short haul question is as follows (pp. 532-4):

"As to the matter of long and short hauls, the question, although *prima facie* one of discrimination, directly involves the right to a reasonable compensation. I assume that the State has the power to prevent a railway company from discriminating between persons and places for the sake of putting one up or another down, or any other reason than the real exigencies of its business. Such discrimination, it seems to me, is a wanton injustice, and may therefore be prohibited. It violates the fundamental maxim, which in effect forbids any one to so use his property as to injure another, *sic utere tuo ut alienum non laedas.* The provisions of the act that I have condensed in paragraphs 3, 4, and 6 aforesaid are intended to prevent this practice. But where the discrimination is between places only, and is the result of competition with other lines or means of transportation, the case, I think, is different. For instance. the act prescribes a reasonable rate for carrying freight between Corvallis and Portland, or from either to points intermediate thereto. But Corvallis is on the river, and has the advantage of water transportation for some months in the year. The carriage of goods by water usually costs less than by land, and as water craft are allowed to carry at a rate less than the maximum fixed for the railway, they will get all the freight from this point unless the latter is allowed to compete with it. But if, to do this, it must adopt the water rate for all the points intermediate between Portland and Corvallis, where there is no such competition, it is, in effect, required to carry freight to and from such points at a less rate than that

which the legislature has declared to be reasonable, or else give up the business at Corvallis altogether. And the same result would follow as to Salem and other points on the east and west side lines, where there is convenient access to water transportation.

"If the legislature cannot require a railway corporation, formed under the laws of the State, to carry freight for nothing, or at any less rate than a reasonable one, then it necessarily follows that this provision of the act cannot be enforced so far as to prevent the railway from competing with the water craft at Corvallis and other similarly situated points, even if in so doing they are compelled to charge less for a long haul than a short one in the same direction. It is not the fault or contrivance of the railway that compels this discrimination, but it is the necessary result of circumstances altogether beyond its control. It is not done wantonly for the purpose of putting one place up or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the legislature has declared to be a reasonable rate, or abandon the field, and let its road go to rust. Nor can the shipper at the non-competing point, or over the short haul complain, so long as his goods are carried at a reasonable rate. It is not the fault of the railway that the shipper who does business at a competing point has the advantage of him. It is a natural advantage

> which he must submit to, unless the legislature will undertake to equalize the matter by prohibiting the carriage of goods by water for a less rate than by rail; and when this is done, the inequalities of distance as well as place may also be overcome by requiring goods to pay the same rate over a short haul as a long one, and then the shipper at Ashland will be as near the market as any one."

To the effect that a rigid long and short haul rule is unconstitutional, see Chicago & Alton R. Co. *vs.* People, 69 Ill., 11. See as to the effect of competition between railroads at the longer distance point, Illinois Central R. R. Co. *vs.* People, 121 Ill., 304. To the effect that a rigid long and short haul clause does not violate the Fourteenth Amendment, see McGrew *vs.* Mo. Pac. Ry. Co. (Mo.), 132 S. W., 1076, 1088.

It seems to me that the clause runs counter to the principles laid down in Adair *vs.* United States, 208 U. S., 161, where an act of Congress was condemned on two grounds, one of which was that it violated the Fifth Amendment. The act in question was section 10 of the Erdman Act, making it unlawful for carriers to discharge employees on account of membership in labor organizations, etc. At page 172, the court said:

> "In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract,

> whatever its subject-matter, can be sustained which the law, upon *reasonable grounds,* forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good."

Consider also Louisville & Nashville R. Co. *vs.* Central Stock Yards Co., 212 U. S., 132, where the court held that a provision in the Kentucky constitution requiring the carrier to deliver its cars to connecting carriers, and a Kentucky law requiring the carrier to accept cars offered by competing roads at arbitrary points near its terminus for the purpose of obtaining the use of its terminal facilities, violated the Fourteenth Amendment. Here the convenience of the public would have been subserved, but that consideration was held not sufficient to justify the requirement imposed upon the carrier. With respect to the clause we are considering, have endeavored to show that it is not adapted to subserving the public interest in any aspect of the case. See also Missouri Pacific R. Co. *vs.* Nebraska, 217 U. S., 196, where a Nebraska statute compelling railroad companies to put in switches at their own expense on the application of the owners of any elevator erected within a specified limit was held to violate the Fourteenth Amendment. Even under the decision in Atlantic Coast Line *vs.* Riverside Mills (Carmack Amendment Case, decided January 3, 1911), the clause is not justified. The decision in that case was controlled by the importance attached by the Supreme Court to the public convenience involved. The court said:

> "If the power existed, and the regulation is *adapted* to the purposes in view, the public advantage

> justifies the discretion exercised and upholds the legislation as within the limit of the grant conferred upon Congress."

Again:

> "The power of government extends to the denial of the liberty of contract to the extent of forbidding or regulating any contract which is *reasonably calculated to injuriously affect the public interests.*"

Again:

> "Having the express power to make rules for the conduct of commerce among the States, the range of Congressional discretion as to the regulation best adapted to remedy a practice found inefficient or hurtful, is a wide one."

Under the declarations of the Supreme Court, the practice of charging lower rates to long distance points is not hurtful, and the enactment is not adapted to the prevention and destruction of discrimination, which is ostensibly the purpose of the act.

There can be no question that to deprive the carrier of the use of its property is to deprive it of the property itself. As said by the Supreme Court in the Minnesota case, *supra* (134 U. S.), at page 458:

> "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law

> and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

In Cleveland, etc., R. Co. *vs.* Backus, 154 U. S., 445, it is said:

> "The value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use."

In Monongahela Navigation Co. *vs.* U. S., 148 U. S., 328, the court says:

> "The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner."

Again:

> "For each separate use of one's property by others, the owner is entitled to a reasonable compensation, and the number and amount of such uses determines the productiveness and the earnings of the property, and, therefore, largely its value."

In the case of *In re* Marshall, 102 Fed., 323, Circuit Judge Ross said (324-5):

> " 'The constitutional guaranty,' said the Court of Appeals of New York in *Re* Jacobs, 98 N. Y., 105, 'that no person shall be deprived

> of property without due process of law, may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated. It is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived, and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property.' See also, Pumpelly *vs.* Green Bay Co., 13 Wall., 177; 20 L. Ed., 557; Wynehamer *vs.* People, 13 N. Y., 398; People *vs.* Otis, 90 N. Y., 48."

There is an aspect of the effect of the clause upon the carrier's rights other than the mere question of deprivation of property itself (though inseparably connected with that aspect of the matter), and that is the interference with the right of the carrier to manage its own affairs. The idea is well illustrated by the language of Justice Jackson, then circuit judge, in the case of Interstate Commerce Commission *vs.* Baltimore & Ohio R. Co., 43 Fed., 37, which is adopted by the Supreme Court in C., N. O. & T. P. R. Co. *vs.* Interstate Commerce Commission, 162 U. S., 184, 197 (and approved in Interstate Commerce Commission *vs.* Alabama Midland R. Co., 168 U. S., 144, 173, and other cases, including the late case of Interstate Commerce Commission *vs.* Chicago, etc., R. Co., 209 U. S., 108, 119):

> "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly dis-

> criminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

The case of Lake Shore, etc., R. Co. *vs.* Smith, 173 U. S., 674, forcibly illustrates the principle. In that case a statute of Michigan requiring railroads to sell mileage books at a reduced rate was condemned by the Supreme Court as violating the Fourteenth Amendment. The principles upon which the case was decided will appear from the following quotation:

> "The legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has

ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law."

Again, p. 692:

"The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a convenience. As so defined it would be more convenient if the right could be claimed without any compensation whatever. But such a right is not a convenience at all within the meaning of the term as used in relation to the subject of furnishing conveniences to the public. And also the convenience which the legislature is to protect is not the convenience of a small portion only of the persons who may travel on the road, while refusing such alleged convenience to all others, nor is the right to obtain tickets for less than the general and otherwise lawful rate to be properly described as a convenience. If that were true, the granting of the right to some portion of the public to ride free on all trains and at all times might be so described. What is covered by the word 'convenience' it might be difficult to define for all cases, but we think it does not cover this case. An opportunity to purchase a thousand-mile ticket for less than the standard rate we think is improperly described as a convenience."

Again (pp. 694-695):

> "If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel them to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations."

This case is followed in a dissenting opinion by three judges of the Kentucky Court of Appeals, in Louisville & Nashville R. Co. *vs.* Commonwealth, 51 S. W., *supra*, at page 1012, which is directly in point in connection with the question here to be determined. The court said (pp. 1012-1013):

> "Under the law as construed by the majority opinion, the company must (1) increase its rates from the Kentucky mines to Louisville beyond the rates fixed to Lebanon, or (2) decrease the

rates from the mines to Lebanon below those charged to Louisville, or (3) depend upon the arbitrary will of the railroad commissioners to adjust the rates as to them may seem proper. If the first alternative is forced on the company, the result is a prohibition of the carriage of coal from the mines to Louisville, as none could be sold there. This result would be confessedly an unwarrantable interference with the reasonable use of the company's property. If the second, then the company is forced to furnish the use of its property at a price below that which is reasonable, and at rates below those which afford a fair and just return on the capital invested. This is true, because it is to be assumed that the rates from the mines to Lebanon are already reasonable and just. The proof offered is conclusive on this point. The only remaining refuge of the company is to submit its management to the arbitrary will of the commissioners. And this, say the court in effect, is better than to leave the matter at issue to a jury. I think the court overlooks the fact that a jury must act within the rules of law. A trial before a jury is had under the ordinary forms of law. The judge and jury are at least controlled and bound by legal principles and precedents. I think, in the first place, neither Congress nor the constitutional convention ever intended to vest their respective boards of commissioners with such extraordinary powers; and, in the second place, I think the law so construed would result in an unwarrantable interference with the reasonable use of the appellants' property, and to an extent not permissible under either State or Federal Constitution."

In Platt *vs.* Le Cocq, 150 Fed., 391, the Circuit Court for the District of South Dakota was called upon to construe a statute of South Dakota making it unlawful for any common carrier to give any preference to any person, locality, etc., or subject any kind of traffic to any disadvantage. The court interpreted the statute to refer to undue advantage and undue prejudice, saying (p. 397):

> "The legislature could not have intended a literal enforcement of the statute, because that would leave the express company no discretion in the conduct of this business whatever, and, if the law could be construed as prohibiting any prejudice or disadvantage, the validity of the law would be in danger."

In Interstate Commerce Commission *vs.* Chicago, etc., R. Co., 209 U. S., 108, where it was necessary for the court to determine whether the Interstate Commerce Act permitted the carrier to make a lower rate for manufactured packing-house products than for live stock, the court said, Justice Brewer delivering the opinion (118-119):

> "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager."

In Chicago, etc., R. Co. *vs.* Chicago (C. C. N. D. Ill.), 142 Fed., 844, a city ordinance requiring a street railroad to accept transfers issued by other companies

was condemned under the Fourteenth Amendment, Judge Grosscup saying:

> "The enjoyment of property meant by the 14th Amendment is that full exercise of dominion over one's own property—over that which one has himself created—that the whole law of property, from ancient times down to the present time, gives to a man, subject only to the paramount rights of the State. * * * Dominion is enjoyment, and dominion is a part of the property right that the 14th Amendment was intended to protect."

In Lawton *vs.* Steele, 152 U. S., 133, the court said:

> "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations."

See Allgeyer *vs.* Louisiana, 165 U. S., 578, 589; Story on the Constitution, section 1950; 2 Tiedeman, Control of Persons and Property, p. 939.

In Bonnett *vs.* Vallier, 17 L. R. A. (N. S.), 496, the court declared:

> "While the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the Republic. For the difficulty which is experienced in defining its just limits and bounds, affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant."

In Wyatt *vs.* Ashbrook, 48 L. R. A., 265, the court said:

> "Mere legislative assumption of the right to direct and indicate the channel and course into which the private energies of the citizen shall flow, or the attempt to abridge or hamper his right to pursue any lawful calling or avocation which he may choose without unreasonable regulation or molestation, have ever been condemned in all free government."

JOHN K. GRAVES.

JANUARY, 1911.

APPENDIX B.

Extract from Address by Mr. W. W. FINLEY, President of Southern Railway Company, before the Traffic Club of Philadelphia, on February 18, 1911.

About a month ago, in an address which I delivered before the Traffic Club, of Washington, D. C., I stated, what I had said on previous occasions, that "the only just method of determining the reasonableness of transportation charges is to measure them by the service performed." A newspaper, in commenting editorially on my address, said, in effect: "This is all right as far as it goes, but will not Mr. Finley tell us just how to apply this yard-stick?" That is what I shall attempt to do this evening.

In order to lay a broad and firm foundation, I shall first state some underlying facts and principles which I believe to be self-evident.

At the outset, it should be borne in mind that the railways of the United States—although public highways, and, as such, properly subject to such governmental regulation as will insure to all citizens equality of rights on them, under similar circumstances and conditions, and as will prevent unreasonable or extortionate charges—have, nevertheless, been built with private capital and are the private property of their owners.

It is a fundamental economic truth that the investment of funds in any class of property is dependent on the safety of the principal and the rate of profit that may be expected as compared with the rate that can be

earned on investments in other kinds of business. In other words, the flow of capital into any particular business will be retarded unless it may be expected to earn a reasonable profit as compared with the earnings of capital in other enterprises. The wise men who framed the Constitution of the United States took cognizance of this principle when they threw the protection of that supreme law of our land about private property in language which the profound lawyers who have composed our Supreme Court have held to cover not only the property itself but the right to its profitable use. Thus, as the Supreme Court said, in the case of Chicago, Milwaukee & St. Paul R. R. Co. *vs.* Minnesota:

> "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

Thus the constitutional standard and the economic standard for the fixing of a charge for any specific service by a privately owned railway are the same. It must be reasonable, as measured by the service performed. It is the common-law rule that he who performs service, in the absence of a specific contract, is entitled to just compensation for that service, and it is

this rule which has governed the courts of England for centuries, and of our own country from colonial times, in determining all controversies as to prices of commodities and charges for services.

The United States Interstate Commerce Law provides that "all charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable." This is simply the legislative enactment of the constitutional and economic standard to which I have referred.

The standard is thus clearly established. It is the right of the carrier to receive reasonable compensation for each service, as measured by that service. That the application of this standard, in specific instances, may be difficult does not excuse failure to apply it. It is being applied with more or less exactness in the practical every-day fixing of charges by the railways and in the cases before the Interstate Commerce Commission and the courts involving the reasonableness of specific charges.

The question of what is a reasonable charge for a specific service is complicated by the fact that neither, as a matter of transportation policy or of public policy, can charges on all classes of traffic be uniform. Commodities of great weight or bulk in proportion to their value must be carried at rates substantially lower than those which may properly be charged for the carriage of commodities which are of high value in proportion to their weight or bulk.

As a result of the necessity for different rates on different classes of commodities, each individual rate or each rate applying to a class of commodities must be considered on its merits in its relation to the particular service performed. The cost of performing the service, as nearly as it can be ascertained, must cer-

tainly be taken into consideration. No rate should be made so low as not to pay something more than what Mr. Acworth, the eminent English economist, has aptly termed "the actual out-of-pocket cost" of moving that particular traffic. If it pays this cost and contributes, even in small measure, toward the general expenses and fixed charges of the carrier, it is a profitable rate, provided the carrier has a considerable volume of traffic moving at higher rates. The low-class traffic moved at these low rates is not a burden on the higher-class traffic, for, by just so much as it contributes to general expenses and fixed charges, it reduces the amount which the higher-class traffic must contribute. In practical rate-making the question of the cost of the service has a controlling bearing only as determining the level below which a rate cannot properly be made.

The value of the service is another important factor in rate-making and in determining the reasonableness of a rate that may be challenged. Transportation enables those engaged in any given industry to carry on their business in those localities best suited for it and to market elsewhere the surplus not needed for consumption at the point of production. By moving commodities from places where the supply exceeds the local demand to places where they are scarce and are wanted, additional value is given to the whole volume of production—including the proportion consumed locally, as well as to that carried to other markets. As affecting the consumer of—let us say, cotton goods, by way of illustration—the carriage of the raw cotton to the mill and the transportation of the finished goods to his market, is a process of production. This transportation gives added value to the raw cotton produced on the farm, and to the goods produced in the cotton mill, and the carrier is, therefore, entitled to fair rec-

ognition for its service in the process of producing the finished cloth and placing it in the hands of consumers, just the same as is the farmer and the cotton-mill owner.

The increased value given to a commodity by transportation is the measure of the value of the service to the owner of the commodity. It is not, however, the absolute measure of a reasonable rate, for, if the transportation charges were so high as to absorb all of this increased value, the owner would have no incentive to ship and the traffic would not move. This may be illustrated by referring to the rail movement of a very low-grade commodity, such as ordinary sand—a commodity which is found in abundance in most localities and the value of which, generally speaking, can be very little increased by transportation. It is manifest that it would be impossible to make a practical rate on sand for any such distance as from Philadelphia to Chicago, for the reason that the out-of-pocket cost of performing the service would be far in excess of the value of the service to the shipper.

As transportation has contributed all of the increased value which is given a commodity by its carriage to market, which, as we have seen, is a factor in effective production, the carrier is entitled to a reasonable share of that increase. The value of the service is, therefore, a most important factor in determining what is a reasonable charge for a specific transaction. Out of the intimate relation of the cost of the service and the value of the service to the reasonableness of a transportation charge grows the fact that, in an era of generally advancing prices, when both the cost of the service and the value of the service are increasing, the level of the reasonable charge for the service thus affected also advances.

In determining the proportion of the value of the service which the carrier may reasonably and justly charge for its part in creating that value, intelligent consideration must be given to comparison with rates charged by the carrier for other similar services, to comparison with the rates of competing carriers, to comparison with the rates at which carriers in other localities move the same commodity under similar circumstances and conditions, to comparison with the rates on similar commodities which might be substituted in use for the one in question, to the intrinsic value of the commodity, to the risk of breakage or other injury in transit, to the insurance risk, to the effect of the rate on the volume of traffic, and to the general condition of the business to which the special traffic is related. When the reasonableness of a rate is called into question, consideration and great weight must be given to expert testimony.

Of all these guides for determining the reasonableness of a specific rate, the effect on traffic is perhaps the most important, for an increasing volume of traffic is *prima facie,* and almost conclusive, evidence that the rate is not unreasonably high, though it may be unreasonably low.

It will be seen that, in the final analysis, the reasonableness of a transportation charge is largely a matter of expert judgment. So is the reasonableness of any price or charge that may be called into question. If one of you employs a lawyer, without any agreement as to what his fee shall be, and, after the service has been performed, you decline to pay his bill on the ground that it is too high, he sues you for the amount of his bill. The question raised is what would constitute a reasonable charge for the service performed, and, on this, testimony will be introduced to show, primarily and principally, the value of the service to you.

Testimony will also be presented as to the usual fees which this lawyer and other lawyers receive for similar services, as to the amount of time consumed, and the skill which he displayed in rendering the service. Based on this testimony the jury will form a judgment as to what is a reasonable charge for the specific service performed. The same method is followed in condemnation proceedings when a railway company seeks to acquire land for railway purposes and fails to reach an agreement with the owner as to the price to be paid. The question here presented is as to the fair and reasonable present value of the land to its owner and as to the fair and reasonable amount to be allowed him for the damage, if any, that may result to his remaining property by the construction of a railway through it. Evidence will be considered as to the value of that particular strip of land, as to the profitableness of the uses to which it has been put by its owner or of the uses to which it might be put. Evidence will also be considered as to the prices at which other tracts of land in the same locality have been sold, and on all these points expert testimony will be considered. The amount which the owner paid for the land, if bought sufficiently near the time of condemnation to be pertinent, may be introduced in evidence and will be considered, but it is not controlling on the jury, which, from all the evidence introduced, must determine what is the just and reasonable compensation to its owner at the particular time when it is taken.

You will note that I have said nothing as to the cost of a railway, its value, or its capitalization as factors in determining the reasonableness of any specific transportation charge. The reason is that, while it is essential to the continued development of the railway system of the United States that the whole body of charges shall be such as to yield such profits as will

attract capital to investment in railway enterprises, neither cost, value, nor capitalization can have any controlling bearing on the reasonableness of any particular charge for a specific service by any particular railway.

Every railway traffic official strives to obtain such an adjustment of each charge for a specific service as will result in the total charges for all services rendered by his company yielding a maximum of revenue. When he comes to the fixing of any specific charge, however, he finds that his discretion is limited very narrowly by economic forces entirely beyond his control. He must consider the competition of other carriers. He must consider the competition of producers in localities off of the line of his road who are marketing the same commodity in the same markets as the producers on his road. He must consider the competition of markets which are seeking to draw commodities produced along his line away from the markkets which it serves. He must consider the competition of similar commodities which may possibly be used in substitution for the one affected by the specific charge under consideration. These competitive forces, and the necessity for so adjusting the charge as to encourage the movement of traffic, effectively fix a level above which he is powerless to advance the charge. He cannot give practical consideration to either the cost of the railway, its value, or its capitalization. If it were otherwise, and if, as seems to be believed in some quarters, transportation charges could be so adjusted as to yield a certain return on railway capital, every railway would be profitable to its owners and such a thing as a bankrupt railway company would be unknown, unless caused by dishonesty or mismanagement.

Transportation charges being controlled so largely by the competitive forces to which I have referred and by the necessity of keeping each charge below the maximum of the value of the service in order to insure the movement of traffic, it follows that the intelligent railway manager, having in view the ultimate interests of the property intrusted to his care, will seek so to adjust each specific charge that it will be reasonable as measured by the specific service. If, through faulty judgment or for any other cause, he shall err in the fixing of any specific charge, his error may be corrected by the machinery which the law has provided for the correction of any charge that may be unreasonable as measured by this standard.

When the specific charges of a railway company have been so adjusted that each is reasonable, as measured by the service performed, and when that company abstains from any undue discrimination in charges or service between individuals, localities, or commodities, if, by reason of the poor location of the railway, high cost of construction, faulty management, or any other cause, the revenues derived from all of its charges are so small as to yield no net return on its capitalization, that is the misfortune of its owners. On the other hand, if, by reason of the favorable location of the road, low cost of construction, efficiency of management, or any other cause, the net return to the owners of the property is substantial, that is their good fortune. They are entitled to the use and enjoyment of the whole of such net returns in the same measure as the farmer whose land is fertile and is favorably located is entitled to the use and enjoyment of all that he can make out of his farm by the most efficient management.

The reciprocal obligations of the railways and the people were clearly stated by Senator Bailey, of Texas,

in an address dealing with this subject delivered before the New York State Bar Association on January 20, 1910, in which he said:

> "The obligation of every railroad to the people is to render them a prompt, safe, and proper service; and to render every person the same service for the same pay. The obligation of the people to every railroad is to pay a just compensation for such services as they require of it; and the whole duty, as well as the whole power of the Government, begins and ends with the due enforcement of these reciprocal obligations."

Senator Bailey thus clearly defines the limit of the duty and the power of government in the regulation of railways built and operated by private capital. His clear and logical mind rejects as legally and economically unsound the measuring of the reasonableness of a transportation charge by any other standard than that of just compensation for the service performed. In the same address he exposes the legal fallacy and the practical impossibility of considering the value of railway property as a controlling factor in determining the reasonableness of a charge for transportation service.

While it was not a case involving railway rates, I believe that the views announced by Justice Brewer of the Supreme Court in Cotting *vs.* Kansas City Stock Yards Company lay down in clear and unmistakable language the rule which should be applied to the determination of the reasonableness of any railway charge. Speaking of a person who has devoted his property to a public use, Justice Brewer said:

"The State's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day, and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because, by reason of the multitude, the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because, out of the multitude of his transactions, the amount of his profits is large."

In this case Justice Brewer clearly announces the rule which I believe should be applied to all questions affecting the reasonableness of railway charges. He clearly lays down the principle that the only question involved in the matter there under discussion was whether any particular charge for a specific service was an unreasonable exaction as measured by that service. He indicates that the value of the service to the person for whom it is rendered must be the principal factor in determining the reasonableness of the charge. This rule eliminates from consideration, except as I shall hereafter explain, all questions of capitalization

and of the value or cost of the property used in performing the service by declaring explicitly that "the legislature may not deny him such reasonable compensation, and may not interfere simply because, out of the multitude of his transactions, the amount of his profits is large." The application of this rule to privately owned railways, which I believe to be proper and will ultimately be done, clearly denies to government the right to place any limitation on the amount that may be earned on railway capital. It would invite the people of the United States to invest their money in the great and honorable business of transportation with the assurance that the properties they create will have the equal protection of the laws and will be surrounded by the same safeguards as are thrown around property in other forms. It would encourage those engaged in this business to strive constantly to make their service more efficient by the adoption of improved appliances and methods, with the assurance that they will be permitted to reap the profits of their enterprise and skill.

While it is an economic and practical impossibility so to adjust any charge for a specific transportation service that it shall bear a fixed and predetermined relation to railway value or capitalization, there are certain conditions under which the return on the capital invested must be considered in determining questions as to the reasonableness of charges. I believe I have established the proposition that when the charges of a railway are not exorbitant or unreasonably high, as measured by the service performed, the right to possess and enjoy the profits it may earn, be they much or little, is a property right in which its owners are protected by the Constitution of the United States. It follows that, unless it can be clearly established that the charges of a railway are exorbitant and unreasonably

high, as measured by the standard of service, any reduction attempted to be made by governmental authority is an unconstitutional act, and evidence showing that such reduction would deprive the owners of the property of a reasonable return on their investment would be conclusive as to its unconstitutionality. Further, in a time of advancing commodity prices and labor costs, the fact that the whole body of its transportation charges fails to yield a fair and reasonable return on the capital invested in a railway is presumptive evidence that there has been such an increase in the cost of the service and in the value of the service as to require a readjustment of charges upon a higher average level. This is but another way of saying that rates must be reasonable for, and under the conditions and circumstances of, the service. In the changed conditions growing out of higher prices for everything else a higher price for railway transportation becomes reasonable.

Under such conditions it is to the public interest that such a readjustment should take place, for the primary interest of the public in the railways is in adequacy of facilities and efficiency of service, and these can be provided, in a country with a constantly increasing volume of traffic, only when the average return on capital invested in railways bears such a relation to the returns on investments in other forms of property as to insure a constant flow of new capital into railway enterprises. In other words, the fair maintenance of the just credit of the railways is a circumstance which should be taken into consideration in determining the reasonableness of rates, not only in the interest of the railways, but in the interest of the public. In this connection, I think we may properly refer to the relation of the governmental policy of Germany to the wonderful industrial development that has

marked the recent history of that country and is still in progress. It is not without significance that we find the highest court in the German Empire saying:

> "When in a branch of industry the prices of a product fall too low, and the successful conduct of the industry is endangered or becomes impossible, the crisis which sets in is detrimental, not merely to individuals, but to society as a whole. It is in the interests of the community, therefore, that inordinately low prices should not exist in any industry for a long time."

If this is true as to the prices of the products of any industry, Mr. Toastmaster, I believe it is equally true of the charges of a railway, for transportation is a part of production, and, in our modern civilization, the prosperity of every industry and of every individual is affected, directly or indirectly, by transportation.

The desire of each man to better his condition and to provide for his family is the mainspring of human progress. I believe that each man should have the most ample liberty to achieve success consistent with the preservation of the same degree of liberty to all other men. I do not believe that, as to those of our fellow-citizens engaged in the business of transportation or any other lawful calling, the intelligent public opinion of the United States will return an affirmative answer to the question which Justice Brewer asked in the Cotting case, to which I have referred, as follows:

> "Is it true in this country that one who, by attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his

means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife?"

I believe, Mr. Toastmaster, that the preservation of individual liberty is essential to our progress as a people, and that the millions of Americans, each seeking to preserve the most ample opportunities for himself and his children, would look upon it as a national calamity if we should say to any citizen "that his industry, ability, activity, and foresight may be rewarded up to a certain extent and that beyond that he may not go."

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

Office of the Court, U. S.
FILED.
JAN 29 1912
JAMES H. McKENNEY,
CLERK.

Nos. ~~882 & 928.~~ 480 & 573

UNITED STATES OF AMERICA,
Appellants,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY *et al.*,
Appellees.

Nos. ~~884 & 930.~~ 481 & 574

UNITED STATES OF AMERICA *et al.*,
Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY *et al.*,
Appellees.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

BRIEF ON BEHALF OF THE CHICAGO ASSOCIATION OF COMMERCE, ONE OF THE APPELLANTS.

RUSH C. BUTLER,
WILLIAM E. LAMB,
STEPHEN A. FOSTER,
CORNELIUS LYNDE,
Solicitors for said Appellant.

STEPHEN A. FOSTER,
Of Counsel.

GUNTHORP – WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

Nos. 883 & 928.

UNITED STATES OF AMERICA *et al.*,
Appellants,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY *et al.*,
Appellees.

Nos. 884 & 929.

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IN THE

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UNITED STATES OF AMERICA *et al.*,
Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY *et al.*,
Appellees.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

STATEMENT OF FACTS.

The appellants call in question the action of the Commerce Court in declaring invalid and enjoining

NOTE.—By stipulation many parts of the original record printed in the transcript of record in Cases 883 and 884 (being the appeals from the granting of temporary injunctions) were omitted in the transcript in Cases 928 and 929 (being the appeals from the final decrees). It was agreed that reference could be made in each case to the record in the others. In this brief we shall give the number of the record as well as the page to which reference is made in each instance.

the enforcement of certain rulings or orders of the Interstate Commerce Commission. These orders were entered by the Commission under the provisions of the long and short haul clause constituting Section 4 of the Act to Regulate Commerce as amended by the act of Congress of June 18, 1910, the principal changes in said section effected by this amendment consisting of the omission of the words "under substantially similar circumstances and conditions" in the first part of the section and the addition of the words here printed in italics. The amended section reads as follows:

> "Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line *or route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act;* but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided, further, that no rates or charges lawfully existing at the time of the pas-*

sage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

Following the adoption of this amendment the Commission promulgated its order of October 14, 1910, entitled "In the Matter of Application for Relief Under the 4th Section of the Act to Regulate Commerce, as amended June 18, 1910," whereby the Commission prescribed the form of application which the carriers were required to use in asking for leave to continue existing rates in force as authorized by the proviso of said amended section. (Rec. 883, p. 30.) Applications Nos. 205, 342, 343, 344, 349, 350 and 352 were thereupon filed with the Commission by the carriers who are appellees in these two cases, whereby they applied for leave to continue in force their existing community rates to the Pacific Coast and the intermediate territory, although these rates violated the prohibition of the long and short haul clause.

Each of these applications so filed by the carriers was entitled: "Application for relief from the pro-

visions of the Fourth Section of Amended Commerce Act in connection with the following tariffs," and each stated that it was "based upon the desire of the interested carriers to continue the present method of making rates lower at the more distant points than at the intermediate points." (Rec. 883, pp. 50-63.)

Upon these applications full hearings were had by the Interstate Commerce Commission and evidence was submitted both in support of and in opposition to said applications. Thereafter the Commission entered the following

ORDER

"At a General Session of the Interstate Commerce Commission, held at its Office in Washington, D. C., on the 31st day of July, A. D. 1911.

Present:

Judson C. Clements,
Charles A. Prouty,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Charles C. McChord,
Balthasar H. Meyer,
Commissioners.

FOURTH SECTION ORDER No. 124.

"In the Matter of the Applications, Nos. 205, 342, 343, 344, 349, 350 and 352, on behalf of the Transcontinental Freight Bureau, by R. H. Countiss, Agent, for relief from the provisions of the Fourth Section of the Act to Regulate Commerce as amended June 18, 1910, with respect to rates made from eastern points of shipment which are higher to intermediate points than to Pacific Coast terminals.

COMMODITY RATES.

These applications, as above numbered, on behalf of the Transcontinental Freight Bureau, ask for authority to continue rates from Eastern points of shipment which are higher to intermediate points in Canada and in the States of Arizona, New Mexico, Idaho, California, Montana, Nevada, Oregon, Utah and Washington, and other states east thereof, than to Pacific Coast terminals.

Full investigation of the matters and things involved in these petitions, in so far as they concern westbound commodity rates, having been had,

IT IS ORDERED, That for the purposes of the disposition of these applications, the United States shall be divided into five zones, as described in the following manner:

(The transcontinental groups hereinafter described are as specified in R. H. Countiss, Agent's Transcontinental Tariff I. C. C. No. 929.)

Zone No. 1 comprises all that portion of the United States lying west of a line called Line No. 1, which extends in a general southerly direction from a point immediately east of Grand Portage, Minn.; thence southwesterly, along the northwestern shore of Lake Superior, to a point immediately east of Superior, Wis.; thence southerly along the eastern boundary of Transcontinental Group F, to the intersection of the Arkansas and Oklahoma state line; thence along the west side of the Kansas City Southern Railway to the Gulf of Mexico.

Zone No. 2 embraces all territory in the United States lying east of line No. 1 and west of a line called line No. 2, which begins at the international boundary between the United States and Canada, immediately west of Cockburn Island, in Lake Huron; passes westerly through the Straits of Mackinaw; southerly through Lake

Michigan to its southern boundary; follows the west boundary of Transcontinental Grop C to Paducah, Ky.; thence follows the east side of the Illinois Central Railroad to the southern boundary of Transcontinental Group C; thence follows the east boundary of Group C to the Gulf of Mexico.

Zone No. 3 embraces all territory in the United States lying east of line No. 2 and north of the south boundary of Transcontinental Group C, and on and west of line No. 3, which is the Buffalo-Pittsburg line from Buffalo, N. Y., to Wheeling W. Va., marking the western boundary of Trunk Line Freight Association territory; thence follows the Ohio River to Huntington, W. Va.

Zone No. 4 embraces all territory in the United States east of line No. 3 and north of the south boundary of Transcontinental Group C.

Zone No. 5 embraces all territory south and east of Transcontinental Group C.

IT IS FURTHER ORDERED (1) that those portions of the above numbered applications that request authority to maintain higher commodity rates from points in Zone No. 1 to intermediate points than to Pacific Coast terminals be, and the same are hereby denied, effective November 15, 1911; (2) that petitioners herein be, and they are hereby authorized to establish and maintain, effective November 15, 1911, commodity rates from all points in zones numbered 2, 3 and 4, as above defined, to points intermediate to Pacific Coast terminals that are higher to intermediate points than to Pacific Coast terminals; provided, that the rates to intermediate points from points in zones numbered 2, 3 and 4 shall not exceed the rates on the same commodities from the same points of origin to the Pacific Coast terminals by more than 7 per cent. from points in Zone No. 2, 15 per cent. from points in Zone No. 3, and 25 per cent. from poitns in Zone No. 4.

The Commission does not hereby approve any rates that may be established under this authority, all such rates being subject to complaint, investigation and correction if they conflict with any other provisions of the act.

By the Commission:

JUDSON C. CLEMENTS,
Chairman."

(Seal)

(Rec. 883, p. 33.)

This is the order attacked by the carriers in the first of the above entitled cases, which was known as case No. 50 in the Commerce Court. The order that is attacked in the other case, which was known as case No. 51 in the Commerce Court, reads as follows:

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 22nd day of June, A. D. 1911.

Present:

Judson C. Clements,
Charles A. Prouty,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Charles C. McChord,
Balthasar H. Meyer,
Commissioners.

No. 879.

"City of Spokane, Wash.; Chamber of Commerce of Spokane, Wash.; County of Spokane, Wash.; and Spokane Jobbers' Association of Spokane, Wash.,

vs.

"Northern Pacific Railway Company; The Great Northern Railway Company; Union Pacific Railroad Company; Oregon-Washington Rail-

road & Navigation Company; Oregon Short Line Railroad Company; Canadian Pacific Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & Northwestern Railway Company; The Lake Shore & Michigan Southern Railway Company; The New York Central & Hudson River Railroad Company; Pittsburgh, Fort Wayne & Chicago Railway Company; The Pennsylvania Railroad Company; The New York, New Haven & Hartford Railroad Company; Boston & Maine Railroad; and Spokane Falls & Northern Railway Company.

This case being at issue upon complaint and answers on file, and having been again duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission being of the opinion that the rates complained of and now in effect are in violation of the fourth section of the Act to Regulate Commerce; that an order should be made under the fourth section and that no other order should be made in this case at the present time; and being further of the opinion that for the purpose of making this order the territory of the United States should be divided into five zones as defined in the following paragraphs of this order, and that rates from points of origin in Zone No. 1 to Spokane and Walla Walla, in the State of Washington, and Baker City, La Grande and Pendleton, in the State of Oregon, should not exceed those contemporaneously in effect from the same points of origin to Pacific Coast terminals; that from points of origin in Zones No. 2, 3, and 4 rates to the above mentioned intermediate points may properly be higher than those contemporaneously in effect to Pacific Coast terminals, but should not exceed such terminal rates by more than 7 per cent. from Zone 2, 15 per cent. from Zone No. 3, and 25 per cent. from Zone

No. 4; and that no finding should be made in this case with respect to rates from points of origin in Zone No. 5; thereupon:

IT IS ORDERED, That for the purpose of the disposition of this case the United States shall be divided into five zones, as described in the following manner (the transcontinental groups hereinafter described are as specified in R. H. Countiss, Agent's, Transcontinental Tariff I. C. C. No. 929):

(Here follows the description of the same zones described in the first order.)

IT IS FURTHER ORDERED, That the above named defendants be, and they are hereby, notified and required to cease and desist on or before the 15th day of November, 1911, and for a period of not less than two years thereafter abstain, from maintaining rates from points of origin in Zone No. 1 to Spokane and Walla Walla, in the State of Washington, and to La Grande, Baker City and Pendleton, in the State of Oregon, which are higher than those contemporaneously maintained from the same points of origin to Pacific Coast terminals; from points of origin in Zone No. 2 such rates to the above intermediate points shall not exceed those to Pacific Coast Terminals by more than 7 per cent.; from points of origin in Zone No. 3 said intermediate rates shall not exceed the terminal rates by more than 15 per cent.; from points of origin in Zone No. 4, by not more than 25 per cent.; and that no order be now made as to Zone No. 5.

AND IT IS FURTHER ORDERED, That this case be reserved for such further order upon the present findings, or for such further investigation, as may be necessary to secure to the complaining localities above specified just and lawful rates, if in view of the rates established in accordance with this order further proceedings seem necessary." (Rec. 884, p. 20.)

Although this order is entitled in case No. 879,

which is a proceeding pending before the Commission upon complaint by the City of Spokane and others, the order expressly recites that it is made under the fourth section alone. Both of the reports made by the Commission, the one referring to the first order appearing in 21 I. C. C. Reports, 329, and the one referring to the second order appearing in 21 I. C. C. Reports, 400, are entitled in the matter of the "Applications for relief under the Fourth Section: Nos. 205, 342, 343, 344, 349, 350 and 352," as well as in the matters then pending on complaint. (Rec. 883, p. 340.) Both of these orders were (it would seem properly) treated by the Commerce Court and by all parties concerned as having been made under the Fourth Section alone. (Rec. 883, p. 339.)

Before November 15, 1911, the date when both of these orders were to become effective, the appellee carriers filed their petitions in the Commerce Court asking to have these orders set aside or annulled and to have the amended fourth section of the Act to Regulate Commerce declared unconstitutional and void. The carriers attacked the constitutionality of the amended fourth section on the ground that when the amendment of June 18, 1910, struck out in the first part of the section the words "under substantially similar circumstances and conditions" it removed the only standard found in the act for the guidance of the Commission in the exercise of its discretion under the proviso in this section. The carriers further maintained that the uncontrolled power which they claim was thus vested in the Commission was strictly legislative, and that such power could be exercised by Congress alone and could not

be delegated to the Commission. (Rec. 883, p. 35, Paragraph XV.)

The Interstate Commerce Commission, in its opinions filed in these cases, had agreed with the contention of the carriers to the extent of conceding that if the Act to Regulate Commerce did not itself contain standards for the guidance of the Commission in acting under Section 4, that section would be unconstitutional, but the Commission had found that the necessary standards were established by Sections 1 and 3 of the act.

To these petitions in the Commerce Court the respondent and the interveners filed motions to dismiss, challenging the jurisdiction of the court and maintaining that the petitions of the carriers disclosed upon their face no equities entitling the petitioners to any of the relief prayed for. (Rec. 883, pp. 273 and 329.) In these motions it was urged that relief by way of injunction as prayed for in the petitions would be wholly ineffectual, as the granting of an injunction against the enforcement of the Commission's so-called orders would leave the absolute prohibition contained in the first part of Section 4 in full force and effect, unless that section were declared unconstitutional and void; that such "orders" were really nothing more than an extension of grace to the carriers and were not orders within the meaning of the word as used in the jurisdictional section of the Commerce Court Act, which reads as follows:

> "* * * Shall have the jurisdiction now possessed by the circuit courts of the United States and the judges thereof for all cases of the follow-

> ing kinds. * * * Second, cases brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. * * * Nothing contained in this act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof that is hereby transferred to and vested in the Commerce Court" (Rec. 883, p. 274.)

that the jurisdiction of the Commerce Court under the clause above quoted extended only to such orders of the Interstate Commerce Commission as were within the jurisdiction of the circuit courts of the United States prior to June 18, 1910, and that the orders here in question could not have been within the jurisdiction of such circuit courts prior to that date, because they were entered by the Commission solely under and by reason of the increased powers vested in the Commission by the amendment adopted by Congress on that date. (Rec. 928, p. 2.)

It was further urged in these motions to dismiss that the petitions filed by the carriers disclosed upon their face that the Interstate Commerce Commission had jurisdiction of the subject-matter and that upon proceedings properly begun an investigation had been conducted by the Commission and that these orders based upon such investigation were within the scope of the Commission's authority; that Section 4 is constitutional; and that the petitions filed do not show that a compliance by the carriers with these orders would reduce the net earnings of the petitioners or either of them to such an extent as to deprive them or either of them of their property, within the meaning of the fifth amendment to

the Constitution of the United State. (Rec. 883, pp. 329 and 330.)

The Commerce Court on November 9, 1911, issued a temporary injunction in each of the cases upon the petition and the affidavits filed in support thereof (Rec. 883, p. 337; Rec. 884, p. 65), and subsequently, on December 6, 1911, the respondent and the interveners having elected to stand upon their motions to dismiss (this appellant and other interveners also joining in the motion of the United States), the Commerce Court made permanent the temporary injunctions theretofore issued. (Rec. 928, p. 4.) In the opinion of the Commerce Court, filed at the time of the issuing of the temporary injunctions, Judge Mack, speaking for the court, said:

> "These cases involve the constitutionality and interpretation of Section 4 of the Act to Regulate Commerce of February 4, 1887, as amended June 18, 1910 (36 Stat. 539) and the powers of the Interstate Commerce Commission thereunder." (Rec. 883, p. 339.)

The court adopted the view of the Commission sustaining the constitutionality of the fourth section, but it held that the orders here attacked were beyond the power of the Commission to enter. The Commerce Court was led to this conclusion by the same considerations that had appealed to the Interstate Commerce Commission as sustaining the constitutionality of the section. The Commerce Court held that in passing upon applications by the carriers for relief under Section 4, the Commission was required not merely to apply Sections 1 and 3 as furnishing the necessary standards for the guidance of

the Commission in granting or refusing the carriers' applications, but that the Commission was also bound, in acting upon such applications, to enter an order that would in effect be an order under Sections 1 and 3 and would establish a reasonable rate for the shorter haul. (Rec. 883, p. 345.) As these orders admittedly did not attempt to fix any definite rates but only named certain percentages, quite irrespective of any absolute rates, which the carriers were required to observe if they availed themselves of the permission granted to depart from the absolute prohibition of the fourth section, the orders were held by the Commerce Court unauthorized and void. The Commerce Court held that these orders establishing a certain relationship between the rates to the intermediate points and "any" coast rates would force the carriers, even under present conditions, to either give up some business to the coast which they can now get in competition with water carriers or to reduce their rates to the intermediate points to a less than reasonable standard; and further held that these orders, in case new water competition should develop at the coast terminals, would force the carriers to make further and undue reductions in their rates to the intermediate points; the Commerce Court apparently being of the opinion that the Commission would not have—or at any rate would not exercise—the power to modify these orders if such new conditions should arise. (Rec. 883, p. 345.) The Commerce Court further commented upon the "practical effect" of the Commission's orders, holding that the Commission in placing Spo-

kane and other interior points upon an equality with the terminal points, so far as rates from Zone 1 are concerned, had ignored what the Commerce Court finds was the absolute right of the coast cities by virtue of their situation on the ocean, to have lower rates from points even as far inland as St. Paul. (Rec. 883, p. 347.)

The final decree entered by the Commerce Court in the Atchison, Topeka & Santa Fe case on December 5, 1911, after reciting the proceedings previously had, concluded as follows:

> "The court doth proceed to enter final decree and for the reasons stated in the opinion of the court filed on the 14th day of November, 1911, doth order, adjudge and decree as follows:
>
> (a) That the equities of this cause are with petitioners and they are entitled to relief as hereinafter granted.
>
> (b) That the order of the Interstate Commerce Commission sought to be enjoined in this cause, to wit, the order entered by them on the thirty-first day of July, 1911, known as fourth section order No. 124, passing on the applications Nos., 205, 342, 343, 344, 349, 350 and 352, on behalf of the Transcontinental Freight Bureau, by R. H. Countiss, Agent, for relief from the provisions of the fourth section of the Act to Regulate Commerce as amended June 18, 1910, with respect to rates made from Eastern points of shipment, which are higher to intermediate points than to Pacific Coast terminals, is invalid;
>
> (c) That said order be and the same hereby is set aside and held for naught, and said applications are declared to be pending before the Interstate Commerce Commission as if said order had not been entered;
>
> (d) That the temporary injunction hereto-

fore granted by this court on the ninth day of November, 1911, is hereby made permanent; and that the United States of America, the Interstate Commerce Commission, and their members, agents, officers, servants and representatives be and they are hereby forever enjoined from enforcing or taking any steps to enforce said order of July 31st, 1911, or from instituting any proceedings for the enforcement thereof, or from endeavoring to recover any penalties by reason of disobedience to said order, or from prosecuting or seeking to prosecute by indictment, complaint or otherwise, any of the petitioners for disobedience to said order; or for a failure to comply with the fourth section of the Act to Regulate Interstate Commerce as amended on the 18th day of June, 1910, relative to charging a greater rate for the shorter haul included within the longer than the longer on the matters covered by said applications pending before the Interstate Commerce Commission until said applications shall have been finally disposed of in accordance with the opinion and decree of this court.

Sixth. That a certified copy of this order be served up the Attorney General of the United States and the Chairman of the Interstate Commerce Commission." (Rec. 928, p. 4.)

The decree in the other case was of substantially the same form. (Rec. 929, p. 3.)

An appeal was prayed to this court in each case from the action of the Commerce Court in entering the final decree. The two appeals prayed from the granting of the temporary injunctions have been consolidated with the appeals from the final decrees and the four appeals come on for hearing together.

SPECIFICATION OF ERRORS.

1. The Commerce Court erred in not dismissing the petitions on the above grounds set forth in the motions to dismiss (Assignments I, II and III, Rec. 928, p. 9; Assignments I and II, Rec. 929, p. 7.)

2. The Commerce Court erred in holding that the action of the Commission in passing upon the applications of the carriers filed under Section 4 is an order of the Commission within the meaning of Section 1 of the Commerce Court Act. (Assignment V, Rec. 928, p. 10.)

3. The Commerce Court erred in holding the orders invalid as being beyond the power of the Commission to enter, in that the Commerce Court held that the Commission, in granting applications under Section 4, could not fix by percentages, irrespective of absolute rates, the relation to be observed by the carriers in initiating, under the permission granted, rates for the long and short haul points. (Assignment VII, Rec. 928, p. 10; Assignment V, Rec. 929, p. 8.)

4. The Commmerce Court erred in holding that if it should be held that the Interstate Commerce Commission in passing on applications by the carriers for relief under Section 4 could establish such percentages, such section would be unconstitutional and void, as an unauthorized delegation of legislative power. (Assignment IX, Rec. 928, p. 11; Assignment VII, Rec. 929, p. 9.)

5. The Commerce Court erred when in its final decree it in effect sought to suspend and annul the fourth section of the Act to Regulate Commerce, although it held such section constitutional, until the applications of the carriers should have been finally passed upon in accordance with the opinion and decree of that court. (Assignment XII, Rec. 928, p. 11; Assignment X, Rec. 929, p. 9.)

6. The Commerce Court erred when in its final decree it in effect directed the Commission to enter orders upon the applications of the carriers, which it held were still pending before the Commission, in accordance with the views of the Commerce Court, when in fact said court is not a court of appeal and its only power is to enjoin, set aside, annul or suspend, in whole or in part, the orders of the Commission, and it has no power such as is ordinarily possessed by a court of appeal to remand to the Interstate Commerce Commission with directions a proceeding of the commission that has been brought before the Commerce Court by a petition to enjoin its enforcement. (Assignment XIV, Rec. 928, p. 12; Assignment XI, Rec. 929, p. 10.)

7. The Commerce Court erred in granting the preliminary injunctions enjoining the above orders of the Interstate Commerce Commission, for that the Commission, in making and entering said orders proceeded in all respects in accordance with the statute in such case made and provided and after a full hearing, and by its orders and its reports in writing accompanying the same, stated the Commission's conclusions together with its decision, and prescribed

the extent to which the petitioning carriers could be relieved from the operation of Section 4; all of which matters and things were within the power of said Interstate Commerce Commission to hear and determine, and its reports and orders were conclusive upon the Commerce Court and the matters and things alleged in the petitions, and the affidavits in support of the same, were insufficient to disturb the said orders. (Assignment VIII, Rec. 883, p. 353; Assignment VII, Rec. 884, p. 68.)

8. The Commerce Court erred in making permanent the preliminary injunctions, for that the Interstate Commerce Commission in making said orders proceeded in all respects in accordance with the statute in such case made and provided, and after a full hearing did, by virtue of its authority in that behalf, prescribe the extent to which the petitioning carriers could be relieved from the operation of the fourth section. (Assignment XI, Rec. 928, p. 11; Assignment IX, Rec. 929, p. 9.)

BRIEF OF THE ARGUMENT.

We have divided our argument into divisions under the following headings. The first three deal with the question of the constitutionality of the amended fourth section, the next two with the question of the jurisdiction of the Commerce Court, and the other divisions with the legality of the orders of the Commission here attacked, assuming that the fourth section is constitutional.

First, as to the constitutionality of the amended fourth section:

I.

THE ONLY LEGISLATIVE POWER EXERCISED UNDER THE FOURTH SECTION WAS BY CONGRESS WHEN IT ENACTED THE GENERAL RULE OF PROHIBITION AGAINST CHARGING MORE FOR THE SHORTER THAN FOR THE LONGER HAUL. THE COMMISSION, WHEN IT REFUSES TO GRANT AN APPLICATION, CLEARLY DOES NOT PRESCRIBE ANYTHING FOR THE FUTURE, AND DOES NOT EXERCISE LEGISLATIVE POWER. NEITHER DOES IT EXERCISE SUCH POWER WHEN IT GRANTS THE APPLICATION ABSOLUTELY OR UPON CONDITIONS. THE COMMISSION, LIKE ALL ADMINISTRATIVE BODIES, CANNOT ACT ARBITRARILY IN PASSING ON THESE APPLICATIONS, BUT MUST, PURSUANT TO THE STATUTE, MAKE AN "INVESTIGATION," AND ITS DECISION MUST BE IN THE HONEST EXERCISE OF A REASONABLE DISCRETION. Page 30.

Louisville & Nashville R. Co. v. *Kentucky*, 183 U. S., 503.

East Tennessee V. & G. R. Co. v. *Interstate Commerce Commission*, 181 U. S., 1.

Yick Wo v. *Hopkins*, 118 U. S., 356; 20 L. Ed., 220.

Interstate Commerce Commission v. *Union Pacific Ry. Co.*, opinion filed in this court Jan. 9, 1912.

Atlantic Coast Line R. Co. v. *N. C. Corporation Commission*, 206 U. S., 20; 51 L. Ed., 933.

Grainger v. *Douglas Park Jockey Club*, 148 Fed., 513.

State of Florida v. *Atlantic Coast Line Ry. Co.*, 56 Fla., 617; 47 So., 969; 32 L. R. A. (N. S.), 639.

State Racing Assn. v. *Latonia Agricultural Assn.*, 123 S. E. Rep., 681; 25 L. R. A. (N. S.), 905.

Atty. General v. *Old Colony R. Co.*, 22 L. R. A., 112.

Railroad Commission v. *Central of Georgia*, 170 Fed., 225.

Davis v. *Commonwealth*, 167 U. S., 43.

Port Royal Mining Co. v. *Hagood*, 3 L. R. A., 841.

II.

THE FOURTH SECTION IS CONSTITUTIONAL, EVEN IF IT BE ASSUMED THAT THE POWER EXERCISED BY THE COMMISSION IS LEGISLATIVE IN ITS NATURE. IN ORDER TO SUSTAIN THE CONSTITUTIONALITY OF THE FOURTH SECTION IT IS NOT NECESSARY TO FIND IN THE OTHER SECTIONS OF THE ACT DEFINITE STANDARDS FOR THE GUIDANCE OF THE COMMISSION IN ACTING UNDER THE PROVISO. WE WOULD SUBMIT THAT A REASONABLE DISCRETION IS AND CONSTITUTIONALLY CAN BE VESTED IN THE COMMISSION UNDER THAT SECTION. Page 49.

Field v. *Clark*, 143 U. S., 649; 36 L. Ed., 294.

United States v. *Grimaud*, 220 U. S., 506.

St. Louis, Iron Mountain & Southern Ry. Co. v. *Taylor*, 210 U. S., 281.

Union Bridge Co. v. *United States*, 204 U. S., 364.

Monongahela Bridge Co. v. *United States*, 216 U. S., 177.

Hannibal Bridge Co. v. *United States*, 22 U. S., 194.

Buttfield v. *Stranahan*, 192 U. S., 470; 48 L. Ed., 525.

Louisville & Nashville R. Co. v. *Interstate Commerce Commission*, 184 Fed., 118.

Trustees of Saratoga Springs v. *Saratoga Gas, Electric Light & Power Co.*, 191 N. Y., 123; 18 L. R. A. (N. S.), 713.

Red C. Oil Mfg. Co. v. *Board of Agriculture*, 172 Fed., 695.

United States v. *Louisville & Nashville R. Co.*, 176 Fed., 942.

State of Florida v. *Atlantic Coast Line Ry. Co.*, 56 Fla., 617; 32 L. R. A. (N. S.), 639.

People v. *Applebaum*, 251 Ill., 18.

Grainger v. *Douglas Park Jockey Club*, 148 Fed., 513.

Railroad Commission of Georgia v. *Clyde S. S. Co. et al.*

Wayman v. *Southard*, 10 Wheat., 1, 42.

III.

THE SAME CONSIDERATIONS OF GOVERNMENTAL POLICY, WHICH HAVE ALWAYS BEEN HELD SUFFICIENT TO SUSTAIN THE DELEGATION, WITHOUT EXPRESS LIMITATIONS, OF POWER LEGISLATIVE IN ITS NATURE TO MUNICIPAL CORPORATIONS, APPLY WITH EQUAL FORCE TO THE DELEGATION OF SUCH POWER TO A COMMISSION. Page 67.

United States v. *Grimaud*, 220 U. S., 506.

Cooley on Constitutional Limitations, pp. 163, 264.

State v. *Noyes*, 30 N. H., 279, 292.

Trustees of Saratoga Springs v. *Saratoga Gas, Electric Light & Power Co.*, 191 N. Y., 123; 18 L. R. A. (N. S.), 713.

Brodbine v. *Inhabitants of Revere*, 182 Mass., 598.

Stat. 3, William & Mary, Sec. 24, Chap. 12.

I Government of England, 363, by A. Lawrence Lowell.

Locke on Civil Government, Sec. 142.

Chicago & Northwestern v. *Dey*, 35 Fed., 866.

Oregan R. & N. Co. v. *Campbell et al.*, 173 Fed., 957.

Atlantic Coast Line Ry. Co. v. *N. C. Corporation Com.*, 206 U. S., 1; 51 L. Ed., 933.

Louisville & Nashville R. Co. v. *Interstate Commerce Commission*, 184 Fed., 118.

Wayman v. *Southard*, 10 Wheat., 1, 42.

IV.

THE CARRIERS, HAVING APPLIED TO THE COMMISSION FOR RELIEF, CANNOT ATTACK BY WAY OF A PETITION FOR INJUNCTION THE RELIEF GRANTED BY THE COMMISSION, MERELY BECAUSE IT DOES NOT GO TO THE "EXTENT" THAT THEY ASKED, AND CANNOT CONTINUE TO DISREGARD THE ABSOLUTE PROHIBITION OF THE FOURTH SECTION WHEN THE ONLY AUTHORITY THEY HAVE TO VIOLATE IT HAS BEEN SET ASIDE BY THE COMMERCE COURT. THE COMMERCE COURT HAD NO JURISDICTION OF THE PETITIONS HERE FILED AND NO AUTHORITY TO ENTER ITS FINAL DECREE. Page 81.

Louisville & Nashville R. Co. v. *Kentucky*, 183 U. S., 503.

Louisville & Nashville R. Co. v. *Kentucky*, 47 S. W., 598.

V.

THE JURISDICTION OF THE COMMERCE COURT IS LIMITED TO SUCH ORDERS OF THE INTERSTATE COMMERCE COMMISSION AS WERE WITHIN THE JURISDICTION OF THE CIRCUIT COURTS OF THE UNITED STATES PRIOR TO JUNE 18, 1910. THE ORDERS HERE IN QUESTION COULD NOT HAVE BEEN WITHIN THE JURISDICTION OF SUCH CIRCUIT COURTS PRIOR TO THAT DATE, BECAUSE THEY WERE ENTERED BY THE COMMISSION SOLELY UNDER AND BY REASON OF THE INCREASED POWERS VESTED IN THE COMMISSION BY THE AMENDMENT ADOPTED BY CONGRESS ON THAT DATE. Page 86.

Louisville & Nashville R. Co. v. *Behlmer*, 175 U. S., 649.

East Tennessee, V. & G. R. Co. v. *Interstate Commerce Commission*, 181 U. S., 1.

Interstate Commerce Commission v. *Alabama M. & R. Co.*, 168 U. S., 144.

In re Louisville & Nashville R. Co., 1 I. C. C. Rep., 59.

VI.

THE COMMERCE COURT ERRED IN HOLDING THAT THE COMMISSION, IN GRANTING THE APPLICATION OF A CARRIER FOR AUTHORITY IN A SPECIAL CASE TO CHARGE MORE FOR THE SHORTER THAN FOR THE LONGER HAUL, MUST CONFINE ITS ORDER TO ABSOLUTE RATES, AND MUST FIX A REASONABLE RATE FOR THE SHORTER HAUL. WE WOULD SUBMIT THAT THE COMMISSION HAS AUTHORITY TO IMPOSE, AS A CONDITION TO THE RELIEF GRANTED, THE REQUIREMENT THAT THE RATES TO BE ESTABLISHED BY THE CARRIER FOR THE LONGER AND THE SHORTER HAUL SHALL MERELY BEAR A CERTAIN RELATIONSHIP TO EACH OTHER AND CAN RESERVE THE RIGHT TO DISAPPROVE OF ANY PARTICULAR RATES WHICH MIGHT BE ESTABLISHED BY THE CARRIERS UNDER THE PERMISSION GRANTED, IF UPON COMPLAINT OR FURTHER INVESTIGATION THEY SHOULD BE FOUND TO BE UNREASONABLE OR DISCRIMINATORY UNDER THE OTHER SECTIONS OF THE ACT. Page 92.

Railroad Commission of Georgia v. *Clyde Steamship Co.*, 5 I. C. C. Rep., 324.

25th I. C. C. Annual Report, 4, 20, 21, 25.

In re Louisville & Nashville R. Co., 1 I. C. C., 31.

Congressional Record, Vol. 45, part 6, p. 6013.

East Tennessee, V. & G. R. Co. v. *Interstate Commerce Commission*, 181 U. S., 1.

VII.

IF THE COMMISSION, WHEN ACTING UPON APPLICATIONS FILED BY THE CARRIERS UNDER SECTION 4, HAD FIXED FOR THE FUTURE REASONABLE RATES FOR THE INTERMEDIATE POINTS—AS THE COMMERCE COURT HOLDS WAS THE DUTY OF THE COMMISSION—IT WOULD HAVE EXCEEDED ITS POWER, FOR IT CAN ONLY INITIATE RATES FOR THE FUTURE UNDER THE PROVISIONS OF SECTION 15 UPON COMPLAINT FILED OR INVESTIGATION INSTITUTED UPON ITS OWN MOTION. Page 116.

Cincinnati, New Orleans & Texas Pacific R. Co. v. *Interstate Commerce Commission*, 162 U. S., 184; 40 L. Ed., 935.

Interstate Commerce Commission v. *Cincinnati, New Orleans & Texas Pacific R. Co.*, 167 U. S., 479.

Chicago, Rock Island & Pacific Ry. Co. v. *Interstate Commerce Commission*, 171 Fed., 680.

VIII.

THE PROPER METHOD OF MEASURING THE EXTENT TO WHICH THE CARRIER SHOULD BE RELIEVED FROM THE OPERATION OF THE FOURTH SECTION AND THE EXTENT OF THE RELIEF TO BE GRANTED IN EACH PARTICULAR CASE, ARE MATTERS TO BE DETERMINED BY THE COMMISSION. THE COMMISSION'S FINDING AS TO THE EXTENT TO WHICH THE MORE DISTANT POINTS CAN LEGITIMATELY BE FAVORED BY THE CARRIERS IS ONE OF FACT, AND IS NOT SUBJECT TO REVIEW IN THE COURTS. Page 123.

Interstate Commerce Commission v. *Union Pacific R. Co. et al.*, decided by this court Jan. 9, 1912.

Interstate Commerce Commission v. *Illinois Central R. Co.*, 215 U. S., 452.

Baltimore & Ohio R. Co. v. *Pitcairn Coal Co.*, 215 U. S., 481.

Interstate Commerce Commission v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S., 88.

Interstate Commerce Commission v. *Delaware, Lackawanna & Western R. Co.*, 220 U. S., 235.

Congressional Record, Vol. 45, Part 6, p. 6124.

IX.

THE ORDERS OF THE COMMISSION ARE NOT INVALID, BECAUSE OF THEIR WIDE SCOPE OR BECAUSE THEY ESTABLISH ZONES IN ACCORDANCE WITH THE USUAL PRACTICE OF THE CARRIERS. Page 143.

Interstate Commerce Commission v. *Cincinnati, New Orleans & Texas Pacific R. Co.*, 167 U. S., 479.

Interstate Commerce Commission v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S., 88.

Chicago, Rock Island & Pacific Ry. Co. v. *Interstate Commerce Commission*, 171 Fed., 680.

X.

IN CONCLUSION, WE FIND OURSELVES AGREEING WITH MANY OF THE LEGAL PROPOSITIONS ADVANCED BY THE CARRIERS, BUT DISAGREEING WITH THEM AS TO THE APPLICATION OF SOME OF THESE PROPOSITIONS TO THE FACTS IN THE CASE AT BAR. Page 153.

ARGUMENT.

ON THE QUESTION OF CONSTITUTIONALITY WE MAKE THE FOLLOWING CONTENTIONS:

1

THE ONLY LEGISLATIVE POWER EXERCISED UNDER THE FOURTH SECTION WAS BY CONGRESS WHEN IT ENACTED THE GENERAL RULE OF PROHIBITION AGAINST CHARGING MORE FOR THE SHORTER THAN FOR THE LONGER HAUL. THE COMMISSION, WHEN IT REFUSES TO GRANT AN APPLICATION, CLEARLY DOES NOT PRESCRIBE ANYTHING FOR THE FUTURE, AND DOES NOT EXERCISE LEGISLATIVE POWER. NEITHER DOES IT EXERCISE SUCH POWER WHEN IT GRANTS THE APPLICATION ABSOLUTELY OR UPON CONDITIONS. THE COMMISSION, LIKE ALL ADMINISTRATIVE BODIES, CANNOT ACT ARBITRARILY IN PASSING ON THESE APPLICATIONS, BUT MUST, PURSUANT TO THE STATUTE, MAKE AN "INVESTIGATION," AND ITS DECISION MUST BE IN THE HONEST EXERCISE OF A REASONABLE DISCRETION.

It must, we think, be conceded that when the Commission refuses an application, it has in no sense legislated. It has not undertaken to prescribe anything whatsoever for the future, but has simply left the carrier subject to the absolute prohibition enacted by Congress against the charging of a higher rate for a shorter than for a longer haul. The power so exercised is purely administrative. Congress has fully legislated and the Commission merely refuses to exempt the carrier from the op-

eration of the act. Neither does the power exercised by the Commission become of a legislative character when, instead of denying, it grants such exemption to the carrier. It would seem difficult to assume that the character of the power exercised could vary according to the nature of its exercise. In these very orders we have relief denied to the carriers so far as zone 1 is concerned, and granted upon conditions as to zones 2, 3 and 4. It cannot be said that this power is of one character in those portions of the orders refusing relief and is of a different character in those portions granting relief. Neither, we would submit, can the fact that the Commission does, in the exercise of its power, attach certain conditions to the granting of relief, change the character of the power which it has exercised or make it legislative. The very terms of the orders here in question show that there was no attempt to prescribe anything for the future. The Fourth Section Order above set forth attacked in the Atchison, Topeka & Santa Fe case does not purport to order the carriers to do anything in the future. It simply denies the application of the carriers as to zone 1 and "authorizes" the carriers to maintain rates in zones 2, 3 and 4 that are higher to the intermediate points than to Pacific Coast terminals, provided the differences did not exceed certain named percentages. The order in the Union Pacific case above quoted is indeed a "cease and desist" order, and requires the carriers for a period of not less than two years to abstain from maintaining rates in violation of the

named percentages. But even this order, like the first, we maintain, does not constitute the exercise of legislative power, for in substance it is, like the first, a permission to the carriers to depart from the absolute exemption of the first part of the fourth section, provided they comply with the conditions named.

The carriers admit that the original fourth section was constitutional, but they contend that the amendment of June, 1910, by striking from the first part of the section the words "under substantially similar circumstances and conditions," deprived the Commission of all standards for its guidance, and that the section is therefore unconstitutional as having vested in the Commission, an uncontrolled and arbitrary power. We would submit that the change made by the amendment has by no means relieved the Commmission from the necessity of considering the similarity or dissimilarity of conditions of the longer and the shorter haul in passing upon applications of the carriers filed under the proviso. Those words have always been held to refer to special competitive conditions that might exist at the more distant point. The whole history of the fourth section as shown in Congress, in the reports of the Commission, and the decisions of the courts discloses that the proviso was incorporated in the fourth section because Congress recognized that when such dissimilarity of circumstances and conditions existed the carrier must in justice to it and to the public be given relief, at least to some extent, from the absolute prohibition of the fourth section.

These considerations are as binding upon the

Commission under the amended section as they were under the original section. In fact, the amendment incorporated in the last clause of the section the first direct reference to water competition, thus clearly indicating that it is to be regarded by the Commission when acting under the proviso. Indeed the carriers in the petitions here filed themselves contend that as a matter of construction the fourth section still requires the Commmission to take into consideration these questions of competition. In paragraph XIX of the petition, in the Atchison, Topeka and Santa Fe case, the carriers allege "Your petitioners further say that assuming said section four as amended by said Act of June 18th, 1910, to be a constitutional enactment, it became the duty of the Commission *when the compelling competitive conditions hereinabove described were established* on said hearing to make an order granting said applications authorizing your petitioners to depart from the long and short haul rule of the fourth section." The carriers therefore contend not only that the Commission must give consideration to such competition in passing upon the applications of the carriers, but also that, upon finding such competition, the Commission is bound as a matter of law to grant the carriers unconditional relief from the operation of the section. We would submit that the position thus assumed by the carriers is inconsistent with their argument against the constitutionality of the section, for if as a matter of construction it can be held, as the carriers contend, that the amended section, even without the omitted

words, still requires the Commission to take competitive conditions into consideration, it would be the duty of the court to so construe the section, and thus sustain its constitutionality against this attack by the carriers.

The words omitted by the amendment were never in the proviso, and the necessity of considering competition in acting under the proviso arose from the general purpose of the act, and not from the presence of these particular words. Indeed, their presence in the first part of Section 4, instead of furnishing a guide for the action of the Commission under the proviso, made any action of the Commission thereunder wholly unnecessary and indeed impossible. The dissimilarity of circumstances and conditions, as a matter of law, relieved the carrier from the prohibition of the fourth section as construed by this court and rendered unnecessary any application on the carrier's part to the Commission. *L. & N. R. R.* v. *Behlmer*, 175 U. S., 649; *East Tennessee Railroad Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, and cases there cited. It therefore appears that the amendment of June, 1910, did not deprive the Commission of any guide for its action which had previously been found in the fourth section. The original section had remained unchanged from its passage in 1887, and had been before the courts in many different cases; its constitutionality had, so far as we are aware, never been questioned by the courts.

We would submit, that under the decisions of this court, it has already been in effect decided, that the power exercised by the Com-

mission under the fourth section is not legislative; but is what may appropriately be termed in the nature of an act of grace. In *Louisville & Nashville R. Co.* v. *Kentucky*, 183 U. S., 503, this court had before it a provision of the constitution of Kentucky which was identical with the fourth section of the interstate commerce act as it existed prior to the amendment of June, 1910. Mr. Justice Shiras, in delivering the opinion of the court, said at page 514:

> "*The argument is* that 'even if it were proper to prohibit absolutely the charging of more for short than long hauls, yet, where the law does not do so, but recognizes that there may be legitimate traffic which could thereby be interfered with, it *is unconstitutional to intrust the dispensation of the right to engage in such legitimate traffic to a mere administrative tribunal, without any rules by which it may be guided, without specifying any conditions upon which the carriers shall be entitled to enjoy such legitimate traffic;* and absolutely free to give or withhold its consent at its own pleasure or will, in any and all cases, without judicial review or control.'
>
> But if it be competent for the state, as this argument supposes, to wholly forbid, in every case and by every carrier, the charging of more for a short than a long haul, it is not easy to see why the state may not permit such charges through the action of a tribunal authorized to investigate the subject and to afford relief in cases deemed proper. *Such a provision is ex gratia, and in the direction of exonerating the carrier from what the argument concedes to be a lawful limitation. Such an exercise of discretion by the railroad commission would be no more arbitrary than if the Constitution had au-*

thorized the legislature to allow in special cases a greater charge for the shorter than for the longer distance, and to prescribe the extent of such excess. We are not prepared to accept the view that the railroad commission, in acting under Section 218 is merely an administrative body, and as such subject to judicial review. It is rather a constitutional tribunal, empowered, upon the application of the carrier, to investigate the special circumstances and conditions which are claimed to justify the relief of the carrier from the operation of this section. *It is not compulsory upon the carrier to make such application for relief to the Commission. If he does not choose to do so, he will continue to operate his railroad under and subject to the constitutional prohibition.*"

The fact that the Kentucky railroad commission was a constitutional tribunal will be claimed by the carriers to distinguish this case from the cases now before the court. While it is true that this fact is of importance in deciding whether the power exercised by the Commission was "delegated" or was derived directly from the people, it does not, as we would submit, in any way affect the nature of the act of the Commission in granting exemption from the long and short haul clause, nor does it affect the question of the constitutionality of this section, so far as the federal constitution is concerned. The validity of the constitution of Kentucky was attacked in this case as being in violation of the due process provisions of the Constitution of the United States, and the above decision is a direct authority sustaining the constitutionality of such provision, and, as we would submit, sustaining the constitutionality of Section 4 of the interstate commerce act,

so far as that section is claimed to offend against the Fifth Amendment.

The mere fact that the provision in the Kentucky constitution contained, as did the original fourth section of the Interstate Commerce Act, the words, "under substantially similar circumstances and conditions," in no way affects the question here under discussion; for, as above stated, those words never formed any guide for the Commission under the proviso. Accordingly, we would submit that this decision is conclusive against the contention made here by the carriers, that the fourth section vests in the Commission such an uncontrolled and arbitrary discretion as would render the section void under the fifth amendment to the Constitution.

We think it also follows from the decision in the Kentucky case, that the act of the Interstate Commerce Commission in exempting a carrier is in the nature of an act of grace, excusing the carrier from full compliance with the law, and not a legislative act prescribing and laying down the law for the future. The reasoning of Mr. Justice Shiras in the above opinion applies exactly to the case here presented. In the fourth section of the interstate commerce law as in the provision of the Kentucky constitution, we have an absolute prohibition by the lawmaking body against the charging of a higher rate for the shorter haul and a discretion vested in the Commission to exonerate the carrier from strict compliance therewith. It is perhaps significant that in the case of *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S., 1, Mr.

Chief Justice White, at page 11, used the same expression, "an act of grace," in referring to the fourth section. He said that the construction of this section placed upon it by the Interstate Commerce Commission would lead to the conclusion that "the dissimilarity of circumstances and conditions became a factor only in consequence of an *act of grace* or of a discretion flowing from or exercised by the Commission." The court in this case, to be sure, held that the fourth section as it then existed, as a matter of law, had no application when there were substantially dissimilar circumstances and conditions, and that the construction by the Commission was erroneous. Now, however, since Congress has, by striking out these words from the first portion of the section, made it mean what the Commission thought it meant, it would seem that the act of the Commission in passing upon the application of the carriers could be properly termed an act of grace.

In support of their contention that the entire fourth section must be declared unconstitutional and void because, as is claimed by the carriers, the Commission could exercise its discretion thereunder in a purely arbitrary manner, the carriers cite the case of *Yick Wo* v. *Hopkins*, 118 U. S., 356, 20 L. Ed., 220. While recognizing the full force of that decision, we would contend that it is entirely distinguishable from the cases now before the court. The ordinance which was declared invalid in that case required no investigation whatever on the part of the municipal officers who were to pass on the issuing of a permit for conducting a laundry busi-

ness in the city of San Francisco. Mr. Justice Matthews, in delivering the opinion of the court, said, at page 366:

> *"They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons.* So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus* to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their consent, without reason and without responsibility. *The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."*

Under the fourth section the Interstate Commerce Commission is expressly required to make an "investigation" of those special cases in which relief is asked and in the cases now before this court it is admitted that such investigation was particularly thorough and that all parties were given the fullest opportunity to present their evidence and their arguments based thereon. It is clear that the power vested in the Commission was, in the language of Justice Matthews, "confided to their discretion in the legal sense of the term" and not "granted to their mere will."

As we understand it, all administrative officers are subject to this restriction, and although their decisions on matters of fact may ordinarily be conclusive upon the courts, we do not doubt that if exercised in a purely arbitrary manner, the parties whose interests were in peril could secure relief in the courts. For instance, by the decisions of this court it has been established that a ruling by the Secretary of War, after a hearing of the matter, that a certain bridge constitutes an unreasonable obstruction of navigation, is conclusive and will not be set aside or even inquired into by the courts, but we venture to say that if it appeared that two bridges, of exactly the same size were constructed across a stream side by side, and the Secretary of War after a hearing decided that one was an unreasonable obstruction and the other was not, without any apparent ground or reason for distinction between the two, his decision would not be held to be conclusive. So here in the case suggested in argument by the carriers, if the lines of two different carriers were situated in exactly the same circumstances and the same considerations could be urged in favor of the exemption of one carrier as for the exemption of the other from an absolute prohibition of the fourth section, it might well be that the action of the Commission in granting the application of one carrier and refusing the application of the other might be so arbitrary as to justify interference by the courts; but we do not believe that the possibility of an abuse of power by the Commission would justify the court in declaring the statute unconstitutional.

In *Atlantic Coast Line Railroad Co.* v. *N. C. Corporation Commission*, 206 U. S., 20, 51 L. Ed., 933, Chief Justice White, in giving the opinion of the court, said:

> "*Wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the 14th Amendment.* The result, therefore, is that the proposition relied upon is well founded if it be that the order which the court below enforced was of the arbitrary and unreasonable character asserted."

In *Interstate Commerce Commission* v. *Union Pacific R. Co. et al.*, decided by this court January 9, 1912, Mr. Justice Lamar, in giving the opinion of the court, said after laying down several rules for determining the finality of the orders of the Commission, that they were not final—

> "If the authority therein involved has been exercised in such *an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Int. Com. Com.* v. *Ill. Cent.*, 215 U. S., 470; *Southern Pacific* v. *Int. Com. Com.*, 219 U. S., 433; *Int. Com. Com.* v. *Northern Pacific*, 216 U. S., 544; *Int. Com. Com.* v. *Alabama Midland*, 168 U. S., 146, 174."

We would submit that this record discloses no basis for an attack upon these orders based upon this doctrine of the cases above cited. The Commerce Court expressly found that the Commission had a full hearing of the matters involved in these orders and the petitions filed by the carriers do not ap-

parently claim that the Commission in deciding these cases based its decisions upon any such considerations as those that dictated the decision of the Commission in the Willamette Valley case and so rendered it invalid.

The *Yick Wo* case is referred to and distinguished in *Grainger* v. *Douglas Park Jockey Club*, 148 Fed. Rep., 513, a case which was heard before Circuit Judges Lurton and Severens and Cochran, District Judge. It was there held that a Kentucky statute regulating horse racing, and establishing a racing commission was not unconstitutional as a denial of the equal protection of the laws, because of the alleged uncontrolled discretion vested in this commission.

Judge Cochran, in delivering the opinion of the court at page 539 said:

> "The power to grant licenses is to be exercised when 'in the judgment of the commission a proper case for issuance of' a license is shown. *The power to revoke a license is to be exercised* upon 'any violation' of the rules, regulations and conditions prescribed by the commission, or *'whenever the continuance' of the license 'shall be deemed by the commission not conducive to the interests of legitimate racing.' There is nothing said as to the considerations that shall affect the commission in the matter of fixing dates. But, as the act in no other particular contemplates that the commission shall act otherwise than along reasonable lines, it would not seem that it contemplated that it should do so here. So that we must conclude that the power conferred on the commission in all particulars was to act 'in the honest exercise of a reasonable discretion.'* * * * The room for the

exercise of a reasonable discretion in such a contingency may be small, and *it may tax one to indicate in advance possible considerations that might reasonably influence the commission in assigning the dates to one association rather than the other, yet it cannot be said that there are no such considerations, and that the commission would be left to the alternative of doing as it pleased or tossing a copper.*"

Such a discretion as was here vested in this commission, broad though it was, was held to be of a different character from the arbitrary power amounting to the "mere personal will" of the administrative officers which was condemned in the *Yick Wo* case.

In *State of Florida* v. *Atlantic Coast Line Ry. Co.*, 56 Fla., 617, 47 So., 969, 32 L. R. A., 639, it is stated at page 661:

> "*An arbitrary and unreasonable regulation is not within the authority of the commission.* If the action of the state through the commission is not a legally authorized regulation of a public service, or if the authorized regulation is *arbitrary and unreasonable*, and in effect deprives the beneficial owners of property used in rendering the public service of their property rights in a manner or to an extent not contemplated by law as a limitation upon the rights of those devoting their property to a public use, such action, though under the form of regulation, is in law a deprivation of property without due process of law, in violation of the state constitution."

But on the other hand it is held at page 662:

> "Where not expressly or impliedly restrained by law, the commissioners may exercise *a wide administrative discretion* in the use of the authority lawfully conferred upon them for gov-

> ernmental purposes, *the usual limitations being good faith and reasonableness,* not wisdom or perfection."

Without citing further authorities, we think it sufficiently appears from the above cases that there is *a clear distinction between a purely arbitrary power and a reasonable discretion such as is vested in the Interstate Commerce Commission under Section 4. The carriers' attempt to bring the cases at bar within the principle of the Yick Wo case cannot, we submit, be sustained.*

We will now refer to some cases where a power analogous to that exercised by the Commission under the proviso in the fourth section has been held valid and an administrative body has been allowed, as in the case last cited, to suspend the operation of a general law and extend an act of grace to some individual or corporation who otherwise would come within its prohibitions.

The same Kentucky Statute, passed upon in the *Grainger* case, *supra,* came before the Court of Appeals of that State in the case of the *State Racing Assn.* v. *Latonia Agricultural Association,* 123 South-Eastern Reporter, 681, 25 L. R. A. (N. S.), 905. In the opinion of the court it is stated:

> "The question at hand is not as if the legislature had declared that all racing is legal, except such as the State Racing Commission should declare illegal, nor is it the equivalent; it is the reverse. The legislature has outlawed all racing, save such as is licensed by a board of officers who shall, in advance, prescribe the general conditions upon which the license may be obtained.
>
> * * * * *

> It was unlawful in Kentucky for appellee to have suffered the acts complained of. *It was not the commission's act that made it unlawful, but the legislative fiat.*"

In *Attorney General* v. *Old Colony R. Co.*, 22 L. R. A., 112, the Supreme Court of Massachusetts sustained the validity of a statute vesting the power in the railroad commission to exempt certain carriers from the general provisions of a law requiring the issue of interchange mileage tickets. Chief Justice Field, in delivering the opinion of the court said at page 119:

> "The legislature, if it sees fit, may establish rates for each railroad separately, and, as different railroads may reasonably require different rates, we see *no objection to the statute on the ground that certain railroads may be exempted or excluded from its provisions.* The subject is one upon which legislation need not be uniform, and the statute cannot be avoided by one railroad company because it is not applied to another. *Re Northampton, supra. We think that the intention of the statute is that it shall apply to every railroad corporation operating a railroad for the common carriage of passengers within the commonwealth, unless the board of railroad commissioners shall determine on petition, after due hearing, that there is something exceptional* in the financial condition of a particular railroad, or in the character of the service it renders to the public, which reasonably requires that railroad to be exempted or excluded from the provisions of the statute, leaving such a railroad to be specially dealt with by the legislature, if it should deem it necessary. *We are not satisfied that the statute is unconstitutional on the ground that it contains a delegation of legislative power to the board of railroad commissioners.*"

In *Railroad Commission* v. *Central of Ga.*, 170 Fed. Rep., 225, the Circuit Court of Appeals of the Fifth Circuit reversed the decision of the Circuit Court, found in 161 Federal Reporter, 921. The Circuit Court had held that the provision of the Alabama statute, that any rates prescribed by the statute might be changed by the Railroad Commission "from time to time, as conditions may, in its judgment, render it expedient so to do" was void, as an attempt to delegate to the Commission legislative power which, under the State Constitution, was vested solely in the legislature. The Circuit Court in its opinion said at page 987:

> "The constitutional trouble with the statute is *that the legislative power has specifically declared its will upon* the wisdom and expediency of the particular classifications and rates, and put them upon the statute books as the law of the land. It takes the lawmaking power to repeal or change a law, as well as to make a law; and the upower of repealing or changing a law, or substituting another law in its stead, cannot be delegated to any other department, much less to a statutory board."

The Circuit Court of Appeals in its opinion, reversing the above decision, said (170 Fed. Rep., 239):

> "Rates are prescribed 'until otherwise provided by order of the Railroad Commission.' The Commission, from the time of its creation, had the power to reduce rates, and, when the legislature fixed maximum or other rates, it knew of this power of the commission, and did not repeal it. We think the legislature had the power to confer the authority in question on the commission. * * * *Whether established directly by legislative action or by the com-*

mission, the rates are always subject to the limitations of both the state and Federal Constitutions. To hold that the legislature could not confer on the commission the power in question would either deprive the legislature of the right to make rates by direct act, or deprive the commission of the power to regulate them. This would not be sound, for, as a question of power, they may be regulated by either the legislature or the commission."

The statutes involved in such cases are sustained in part because of the doctrine that if the power of the legislative body to absolutely prohibit, is admitted, it must follow that the lesser power to grant exemptions, upon conditions, from such absolute prohibition is included, and that the conditions so imposed are binding upon the applicant asking for relief.

In the case of *Davis* v. *Commonwealth,* 167 U. S., 43, which involved the validity of an ordinance of the City of Boston, prohibiting the making of an address on "Boston Common," without a permit from the Mayor, Chief Justice White, in delivering the opinion of the court said (page 48):

> "The assertion that although it be conceded that the power existed in the state or municipality to absolutely control the use of the Common, the particular ordinance in question is nevertheless void because arbitrary and unreasonable in that it vests in the mayor the power to determine when he will grant a permit, in truth, whilst admitting on the one hand the power to control, on the other denies its existence. *The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power con-*

> *tains the lesser.* The finding of the court of last resort of the State of Massachusetts being that no particular right was possessed by the plaintiff in error to the use of the Common, is in reason, therefore, conclusive of the controversy, which the record presents *entirely aside from the fact* that the power conferred upon the chief executive officer of the City of Boston by the ordinance in question *may be fairly claimed to be a mere administrative function vested in the mayor* in order to effectuate the purpose for which the Common was maintained and by which its use was regulated. *Ex parte Kollock,* 165 U. S., 526, 536, 537 (41; 813; 816, 817.) *The plaintiff in error cannot avail himself of the right granted by the state and yet obtain exemption from the lawful regulations to which this right on his part was subjected by law."*

In *Port Royal Mining Co.* v. *Hagood,* 3 L. R. A., 841, the Supreme Court of South Carolina sustained the validity of a statute giving discretion to grant or refuse a license to mine phosphate rock in the beds of navigable streams which are held by the state in trust for the public. One of the grounds of attack upon the act was that it failed to prescribe the standard by which an applicant's right to a license should be determined, but left the determination of such standard and the fact of an applicant's compliance with such standard to the arbitrary discretion of the board. In the opinion of the court it is stated:

> "It is undoubtedly true that legislative power cannot be delegated, but it is not always easy to say what is and what is not legislative power in the sense of the principle. * * * The relator is not asking to be protected in a right common to all, but to obtain a license to mine in the navigable waters of the state, which is in the nature of a special privilege."

Applying the principle of these cases to the cases now before the court, it appears to be conceded that Congress could, had it seen fit so to do, pass an absolute rule of prohibition against the charging of a higher rate for the shorter haul, and if Congress possesses this greater power, it must certainly follow that it possesses the lesser power of granting exemption, upon conditions, to the carriers in special cases.

We would submit, in conclusion, that the power exercised by the Commission under the fourth section is not even legislative in its nature, and that the rule prohibiting the delegation of strictly legislative power can have no application to the question here presented.

II.

THE FOURTH SECTION IS CONSTITUTIONAL, EVEN IF IT BE ASSUMED THAT THE POWER EXERCISED BY THE COMMISSION IS LEGISLATIVE IN ITS NATURE. IN ORDER TO SUSTAIN THE CONSTITUTIONALITY OF THE FOURTH SECTION IT IS NOT NECESSARY TO FIND IN THE OTHER SECTIONS OF THE ACT DEFINITE STANDARDS FOR THE GUIDANCE OF THE COMMISSION IN ACTING UNDER THE PROVISO. WE WOULD SUBMIT THAT A REASONABLE DISCRETION IS AND CONSTITUTIONALLY CAN BE VESTED IN THE COMMISSION UNDER THAT SECTION.

As above stated, the carriers in their petitions took the position that if the fourth section is constitutional, the presence of dissimilar competitive conditions would make it mandatory upon the Commission to grant unconditional relief from the opera-

tion of that section. The Commission and the Commerce Court held that if there are dissimilar conditions and it appears that the granting of the application would not result in the establishing of unreasonable rates or in giving undue preferences, it would be the duty of the Commission to grant the permission asked by the carrier. The position of the Commerce Court in this regard is made plain by the following statement on page 15 of Judge Mack's opinion:

> "But to *sustain the constitutionality* of the proviso in section 4 it must be read *as imposing the duty on the Commission not only to grant exemption from the hard and fast rule when thereby no section of the act is violated, but also to grant such exemption to the extent that no section of the act is thereby violated;* that is, the carrier is entitled under the act to be granted authority to charge as much less as it please for the long haul than for the short haul, provided the Commission shall first determine that it does not thereby violate any other provision of the law." (Rec. 883, p. 345.)

Both of these constructions seem to us to place too strict a limitation upon the discretion vested in the Commission under the fourth section. As above stated, the Commission cannot in any event act in an arbitrary manner or in violation of the constitutional prohibitions, and further than that, as an administrative body it of course cannot take action that would defeat the very purpose of the law which it was created to carry out. The Commission could not, in acting under the fourth section, ignore the fundamental principles requiring reasonable and non-discriminatory rates,

principles which are found in the common law as well as in the express legislation by Congress. We do believe, however, that the Commission is, and in the nature of things must be, vested with a wide discretion in the exercise of this power to suspend the operation of the fourth section and that it would be unwise to try to definitely enumerate the exact matters which might in that connection properly be taken into consideration by the Commission. It is true that the Commerce Court sustained the constitutionality of the amended fourth section, but it is important for us to examine the grounds of that decision because the Commerce Court was properly influenced in ariving at what it considered was the correct construction of the act, and the authority of the Commission thereunder, by the conclusions which it (the Commerce Court) had reached as to what powers could constitutionally be vested in the Commission.

Starting with the premise that only a very limited discretion could constituionally be delegated to the Commission, the Commerce Court reached what may have been the natural—but, we would submit, by no means the inevitable—conclusion from this premise that the Commission, in passing upon applications under Section 4, must apply the standards, and only those, laid down in Sections 1 and 3 and must, in proceeding under Section 4, fix the reasonable rate for the shorter haul.

The carriers contended before the Commerce Court that sections 1 and 3 could not be used as establishing definite standards for the guidance of

the Commission under section 4; we do not know whether they will here make the same contention contrary to the holding of the majority of the Commerce Court. The carriers' position in this regard was sustained in the concurring opinion of Judge Archbald. With much that is there said, we heartily agree though of course we do not agree with the conclusion he reached that the section was unconstitutional.

Judge Archbald said at page 21:

> "Undoubtedly the statute is to be taken as a whole and the different sections read together, but I fail to see how this helps out the matter. By the first section it is prescribed that all charges for any service rendered or to be rendered by carriers subject to the act in the transportation of passengers or property shall be just and reasonable, and every unjust and unreasonable charge is prohibited and declared unlawful. This does no more than enact the common into the federal law, and neither adds to nor detracts from the rights of such carriers, except as it inferentially recognizes their right to a just and properly remunerative rate, in prohibiting an unjust and unreasonable one. But how does this assist the Commission in any given case whether to enforce or relieve the carrier from the greater short than long haul charge prohibited by the first part of the section in question, or what direction or guide to that end does it afford? No doubt it insures to the carrier that the short-haul charge shall be reasonably remunerative where it has not been voluntarily abandoned, although the Commission in the order made has entirely disregarded this. But that is only half of the problem to be solved, if, indeed, it is that much. *The point is that it affords no guide in determining when a*

disparity between the short and the long haul shall be permissible, which is the question which in each case is to be decided by the Commission. But it is further said that at this juncture the third section comes in, and authorizes a less charge for a long than for a short haul, provided an undue or unreasonable preference or advantage does not result to any person or locality over any other. But this provision of the statute is not permissive, but prohibitive. It forbids in brief any undue discrimination, as the first forbids unjust or unreasonable rates, or the fourth the particular kind of discrimination against which it is leveled. It may be, correlatively or by inference, that a right to discriminate is recognized when it can be done without injustice or prejudice. But how again does this afford a guide to the Commission in determining when a greater short than long haul charge shall be sanctioned? The fourth section in express terms declares that except as extenuated by the action of the Commission a greater short than long haul charge is *per se* a discrimination and advantage which is unjust and undue, and not to be tolerated. And how is it possible, then, to say that a prohibition against what is undue furnishes a guide or rule in determining when it shall result that that which so on its face is to be regarded as undue shall no longer be so? *There shall be no undue discrimination, says the third section. A greater short than long haul charge is an undue discrimination, says the fourth. At what, then, do you arrive by combining the one with the other? Or where is there to be found the criterion or standard which is to enable the Commission to say when and under what circumstances that which it is bound otherwise to say is an unjust and undue preference or advantage of one locality over another is not so?"* (Rec. 883, p. 348.)

Under a subsequent heading in this brief we shall deal more at length with the practical considerations pointing to the vesting of a wide discretion in the Commission when acting under the fourth section and granting the special and, in a sense, temporary relief provided, in order to enable the carriers to continue in force "the lawfully existing rates at the time of the adoption of the amendatory act" of June 18, 1910, but at present we shall only discuss this matter so far as necessary in dealing with the constitutional questions involved.

We believe that an examination of the cases will show that the delegation to the Commission of discretion in these matters is constitutional, even though it be assumed that the power exercised by the Commission is legislative in its nature and that the act contains no express standards for the Commission's guidance.

The carriers rely upon the case of *Field* v. *Clark*, 143 U. S., 649, 36 L. Ed., 294, as establishing the contrary view. In that case the reciprocity provision of the tariff law vesting in the President the power to suspend the tariff duties when "he may deem" that the duties imposed by a foreign country are reciprocally equal and reasonable in their effect upon the American products and to suspend it for "such a time as he may deem just," was sustained by this court. It was held that this was not the delegation of legislative power, but the carriers rely upon the language used in the opinion of the court stating that Congress had left nothing to the President but the determination of a definite fact, and that the President "had no discretion except in

respect to the duration of the suspension so ordered." In the dissenting opinion of Mr. Justice Lucius Q. C. Lamar, in which Mr. Chief Justice Fuller concurred, it is pointed out that in reality the suspension of the law was left to the discretion of the President without any definite standard for his guidance. Surely there was no more definite standard laid down in this case than is laid down in the interstate commerce act for the guidance of the Commission, even if it be assumed that the Commission has under that act the broader discretion for which we contend. The matter upon which the President was to pass in the statute before the court in the Field case was one which would necessarily allow of a great latitude of opinion and could not be determined by any hard and fast rules. So under the fourth section here the Commission has to pass upon the complicated and often controverted questions of competition, and, after an investigation, must decide in the honest exercise of a reasonable discretion what, if any, relief should be granted to the carrier.

In *United States* v. *Grimaud*, 220 U. S., 506, Mr. Justice Lamar, in delivering the opinion of the court, said, at page 516:

> "*In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power.* The authority actually given was much less than what has been

granted to municipalities by virtue of which they make by-laws, ordinances and regulations for the government of towns and cities. Such ordinances do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities, nor declare what shall be crimes nor fix penalties therefor.

By whatever name they are called they refer to matters of local management and local police. *Brodbine* v. *Revere*, 182 Mass., 598. *They are 'not of legislative character in the highest sense of the term;* and as an owner may delegate to his principal agent the right to employ subordinates, giving them a limited discretion, so it would seem that Congress might rightfully intrust to the local legislature (authorities) the determination of minor matters.' *Butte City Water Co.* v. *Baker*, 196 U. S., 126.

It must be admitted that it is difficult to define the line which separates legislative power to make laws from administrative authority to make regulations. This difficulty has often been recognized, and was referred to by Chief Justice Marshall in *Wayman* v. *Southard*, 10 Wheat., 1, 42, where he was considering the authority of courts to make rules."

It is difficult in this case to find any definite standard prescribed by the act for the Secretary's guidance. He was authorized "to make provision for the protection against destruction by fire and depredations upon the public forests and forest reservations, and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."

Apparently the rules to be made by the secretary

could vary, for, as Mr. Justice Lamar points out, each reservation had its peculiar and special features and the only standard that the Secretary was required to observe was that of the general purpose of the act, to protect the forest reservations.

St. Louis, Iron Mountain & Southern Railway Co. v. *Taylor,* 210 U. S., 281, dealt with a provision in Section 5 of the safety appliance act of March 2, 1893, 27 Stat., 531, delegating to the American Railway Association and the Interstate Commerce Commission the authority to designate and promulgate a union standard height of drawbars for freight cars. *The statute did not in any way indicate what this height should be.* Mr. Justice Moody, in delivering the opinion of the court, said:

> "It is contended that there is here an unconstitutional delegation of legislative power to the Railway Association and to the Interstate Commerce Commission. This is clearly a federal question. Briefly stated, the statute enacted that after a date named only cars with drawbars of uniform height should be used in interstate commerce, and that the standard should be fixed by the Association and declared by the Commission. Nothing need be said upon this question except that it was settled adversely to the contention of the plaintiff in error in *Buttfield* v. *Stranahan,* 192 U. S., 470, a case which in principle is completely in point. And see *Union Bridge Co.* v. *United States,* 204 U. S., 364, where the cases were reviewed."

In *Union Bridge Co.* v. *United States,* 204 U. S., 364, 51 L. E., 523, Mr. Justice Harlan, in delivering the opinion, reviewed the authorities in all of which the delegation of power had been sustained and then said:

"By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. *In performing that duty the Secretary of War* will only execute the clearly expressed will of Congress, *and will not, in any true sense, exert legislative or judicial power.* He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions. *If the principle for which the defendant contends received our approval, the conclusion could not be avoided that executive officers, in all the departments, in carrying out the will of Congress, as expressed in statutes enacted by it, have, from the foundation of the national government, exercised, and are now exercising, powers as to mere details, that are strictly legislative or judicial in their nature.* This will be apparent upon an examination of the various statutes that confer authority upon executive departments in respect of the enforcement of the laws of the United States. *Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business.*"

The only test here laid down by the Act of Congress is that the bridge must not be "an *unreasonable* obstruction to the free navigation of such waters on account of *insufficient height, width of span, or otherwise*, or where there is *diffiulty* in passing the draw opening or the draw span of such bridge by rafts, steamboats or other water craft." This standard we would submit, varies according to the circumstances of each particular case and can by no possibility be termed a definite standard for the guidance of the Secretary. As a practical matter, it is evident that he must exercise a very wide discretion in determining what is a reasonable and what is an unreasonable obstruction of navigation.

Monongahela Bridge Co. v. *U. S.*, 216 U. S., 177, and *Hannibal Bridge Co.* v. *U. S.*, 221 U. S., 194, are to the same effect.

In *Buttfield* v. *Stranahan*, 192 U. S., 470, 48 L. Ed., 525, this court sustained an act of Congress authorizing the Secretary of the Treasury, upon the recommendation of a board of experts, to "fix and establish *uniform standards of purity, quality and fitness for consumption* of all kinds of teas imported into the United States." Mr. Chief Justice White, in delivering the opinion of the court, said at page 496:

> "*The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute*, when properly construed, as said by the circuit court of appeals, but *expresses the purpose to exclude the*

lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. *This, in effect, was the fixing of a primary standard,* and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. * * * *Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.*"

Here, again, we have only the most general "primary" standard established by Congress, but the act was sustained because the delegation of power was to be exercised in accord with the general purposes expressed in the act.

In *Louisville & Nashville R. Co.* v. *Interstate Commerce Commission,* 184 Fed., 118, Judge Severens, in delivering the opinion of the court, said at page 122:

"And it would be difficult to instance an occasion in the history of federal legislation so plainly subject to the application of this exceptional rule as the enactment of the interstate commerce law and the carrying forward of its scheme by subsequent amendments. It is manifest that some such scheme as this must have been adopted or the purpose to control carriers engaged in interstate commerce must fail. *It would have been impossible for Congress to have foreseen the multitude of questions depending upon the special facts presented, sometimes in*

one complication and sometimes in another, and declare a single rule applicable to each. The most that it could do would be to declare the general rules to indicate its purpose and to serve as guides in the determination of questions which would arise, and delegate the power of applying them to some competent public agency always in the field and ready to entertain and dispose of controversies. And it is indispensable to this power that the Commission should have the right to exercise its judgment and to form conclusions upon the facts. To enable it to do this, the statute provides that notice shall be given to interested parties, that a hearing shall be had and proofs taken. *We think there is no valid constitutional objection to the law, in that legislative powers are improperly delegated.*"

In *Trustees of Saratoga Springs* v. *Saratoga Gas, Electric Light & Power Co.*, 191 N. Y., 123, 18 L. R. A. (N. S.), 713, Mr. Chief Justice Cullen, in delivering the opinion of the court, said at page 718 (L. R. A.):

"It is contended that, conceding that the legislature may commit to an administrative board the power to determine a tariff of rates, the statute must prescribe some standard by which the action of the board is to be governed, and that otherwise the whole plenary power of the legislature is intrusted to the board, whose action may be arbitrary; and it is urged that the statute before us provides no such standard. We think otherwise. The statute provides that the Commission shall fix the rates within the limits prescribed by law. This includes both statute law and common law. There may have been companies which had franchises immune from invasion by which they were authorized to charge specific rates. The common law prescribes the rule that the rate shall be reasonable, and I

> think, even without special mention, the statute would necessarily imply the same limitation. But it is said that, granting this, 'reasonable' is really no standard, but a mere generality. Again, we are of a different opinion. Indeed, if the statute assumed to fix any other standard for rates than that they should be reasonable, we think it would be much more open to attack than in its present form."

It would seem by establishing the standard of "reasonableness" the act of Congress did not furnish to the Commission any further guide for the fixing of rates than that which would have been enforced under the common law and without such express legislation. Neither would it be within the power of Congress to establish any rates that were not reasonable, and it would seem that Congress has, in delegating to the Commission the power to fix reasonable rates, vested in it as full a control over the fixing of rates as it itself possessed. The standard of "reasonableness" is not therefore a limitation upon the power granted and it can hardly be held to have been established by Congress, as it already existed independently of the act.

In *Red C. Oil Mfg. Co.* v. *Board of Agriculture,* 172 Fed. Rep., 695, Judge Connor at page 711 said:

> "The last assault made upon the act and strongly urged in the argument, is that it is incomplete, indefinite, and dependent for its validity and enforcement upon the exercise of legislative power conferred upon the Board of Agriculture. It is true *that the act fixes no other standard than that the oil shall be satisfactory in respect to safety and illuminating power, nor does it prescribe any method of testing it for the pur-*

pose of ascertaining whether it conforms to the standard in these respects. Power is conferred upon the Board of Agriculture 'to make all necessary rules and regulations for the inspection of such oil and *to adopt standards of safety and purity.*' It is said that, until this legislative power is exercised, the act is incapable of enforcement, that it is a mere legislative declaration of a purpose to subject oil to inspection giving the manufacturer no notice of the standard to which its oil must conform, nor the consumer of what he has a right to demand. This power, it is urged, is vested exclusively in the Legislature, and cannot be delegated. Article 2, Sec. 1, of the State Constitution, provides that 'the legislative authority shall be vested in two distinct branches both dependent on the people' and section 8, art. 1, declares that the legislative, executive and supreme judicial powers ought to be kept forever separate and distinct."

At page 712, after referring to railroad rate and other similar statutes, he continued:

"It is said that a standard is fixed by the statutes creating these commissions that the rates are to be 'reasonable,' *so here the oil is to be 'satisfactory' in respect to safety and luminosity.* Some of the cases cited may be distinguished, and some, although very much in point, it might be shown are not in harmony with the current of authority. The principle upon which this act may be sustained is stated and its applicability illustrated in *Buttfield* v. *Stranahan*, 192 U. S., 470, 24 Sup. Ct., 349, 48 L. Ed., 525."

Here we have a most indefinite guide—if there can be said to be any at all—for the Board to follow.

In *United States* v. *Louisville & Nashville R. Co.*, 176 Fed., 942, the court had before it for consideration the act of Congress authorizing the Secretary

of Agriculture to establish quarantine limits for the transportation of live stock. District Judge Grubb, at page 946, said:

> "Section 2, however, forbids the shipment of live stock from a quarantined territory in one state to another state, except as hereinafter provided; * * * and the exception is that in the event the Secretary shall deem the public safety permits, he shall establish rules and regulations under which live stock may lawfully move from the quarantined territory of one state to another state."

Again, at page 947:

> "In legislating on the subject, *Congress could not* have before it the facts relating to each epidemic to be provided for, and could not *make rules in advance to fit the exigency of each varying case as it arose.* It therefore provided a general prohibition of shipments from quarantined territory, and further provided that the Secretary, as each epidemic arose, should have the power, *if he determined that the public safety justified it,* to permit shipments for certain purposes and under certain conditions to be determined by *rules and regulations to be established by him for that specific epidemic.* * * *
>
> *The act confers on the Secretary the power to determine in each epidemic* (1) *whether shipments can be made consistently with public safety at all; and, if so* (2), *upon what conditions.* All epidemics, as to which the Secretary fails to make this determination, are governed by the general prohibition of the statute. As to others, the Secretary is invested by the act with the power conditionally *to suspend the operation of the prohibition* by permitting shipments for certain purposes and under certain safeguards formulated by departmental rules."

Here, again, we find no definite guide laid down for the Secretary of Agriculture, he being left free

to determine what shipments, in his opinion, would be consistent with "public safety."

In *State of Florida* v. *Atlantic Coast Line Ry. Co.*, 56 Fla., 617, 32 L. R. A. (N. S.), 639, it was held by the Supreme Court of Florida that (p. 658):

> "In order to justify the courts in declaring invalid, as delegation of legislative power, a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted under the provisions of the Constitution.
>
> * * * * *
>
> The common law duties of common carriers are ascertained by the application of legal principles to particular facts. The statutes of the state do not define all the duties of common carriers, but expressly authorize the railroad commissioners to make reasonable and just rules and regulations to carry into effect the legislative purpose to regulate intrastate transportation by common carriers. The authority necessarily includes the power to make all rules and regulations needful or expedient to accomplish the general statutory purpose. The authority of the commissioners is not confined to the restatement of defined common law or statutory duties, but it extends to the making of any just and reasonable rules or regulations appropriate to the subject of administration and regulation within the bounds already fixed by the law. Modern development of the service requires the application of old legal principles to new circumstances; hence, rules defining duties that have not been previously ascertained, but are determined by existing legal principles, are necessary for effective regulation, and these rules may be formulated by administrative offi-

> cers within defined limits as an incident to the effective operation and enforcement of existing valid laws."

In the recent case of *People* v. *Apfelbaum*, 251 Ill., 18, the Supreme Court of Illinois sustained the delegation of power to the State Board of Health. Mr. Justice Dunn, in delivering the opinion of the court, at page 22, said:

> "Section 6 is not void for uncertainty. It authorizes the refusal of the license for certain specific reasons and *also generally for unprofessional and dishonorable conduct*, and provides that the license may be revoked for the same reasons. *The reasons particularly named are certain enough, but it would scarcely be possible for the statute to catalogue specifically every act of unprofessional or dishonorable conduct which would justify the refusal or revocation of a license.*"

We would submit that it appears from an examination of the above authorities that it is not necessary in order to sustain the validity of a clause delegating power to an administrative body to find in the act itself some express and definite guide for the exercise of the discretion so vested in the administrative body. As was said by the Circuit Court of Appeals in *Grainger* v. *Douglas Park Jockey Club, supra*, "It may tax one to indicate in advance possible considerations that may reasonably influence the Commission" in performing its duty, and because of this, we would submit, the discretion that is vested in the administrative body can and properly should be left without hard and fast rules or limitations.

We would submit, therefore, that it is not neces-

sary, in order to sustain the constitutionality of the fourth section, to hold, as the carriers maintain, that the Commission is bound to grant unconditional relief under the proviso whenever dissimilar circumstances at the more distant point are shown to exist; nor is it necessary, on the other hand, to hold, as the opinions of both the Commission and the Commerce Court maintain, that the Commission is under a mandatory duty to grant relief to the carriers in all cases where such dissimilarity of circumstances and conditions appear, providing the granting of such relief would not result in unreasonable rates or discrimination. Rather, we would maintain, under the correct interpretation of the authorities, a reasonable discretion can constitutionally be vested in the Commission, and that it is not necessary to find in the act or to establish by decision hard and fast rules for its guidance.

III.

THE SAME CONSIDERATIONS OF GOVERNMENTAL POLICY WHICH HAVE ALWAYS BEEN HELD SUFFICIENT TO SUSTAIN THE DELEGATION, WITHOUT EXPRESS LIMITATIONS, OF POWER LEGISLATIVE IN ITS NATURE TO MUNICIPAL CORPORATIONS APPLY WITH EQUAL FORCE TO THE DELEGATION OF SUCH POWER TO A COMMISSION.

In the part of the opinion above quoted from the case of *United States* v. *Grimaud*, Mr. Justice Lamar referred to the well-nigh universal practice of delegating power that is legislative in its nature

to municipalities. Such delegation always goes unchallenged, although the state constitutions usually expressly provide that all legislative power is vested in the legislature and they commonly forbid the exercise by one branch of the government of the powers vested in either of the others. In the grant of power to the municipality the state rarely, if ever, lays down any specific standards, but under the decisions of the courts municipal ordinances must not violate the general principles of reasonableness and equality. In Illinois the Cities and Villages act vests in the city councils the power to pass "all necessary police ordinances" and power to "do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease." Speaking of this well recognized exception to the general rule prohibiting the delegation of legislative power, Judge Cooley, in his book on Constitutional Limitations, said at page 264:

> "It has already been seen that the legislature cannot delegate its power to make laws; but fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation usual with such corporations, would always pass unchallenged."

Among the citations in the notes is the following:

> "'It seems to be generally conceded that powers of local legislation may be granted to

cities, towns and other municipal corporations. And it would require strong reasons to satisfy us that it could have been the design of the framers of our Constitution to take from the legislature *a power which has been exercised in Europe by governments of all classes from the earliest history*, and the exercise of which has probably done more to promote civilization than all other causes combined; which has been constantly exercised in every part of our country from its earliest settlement, and which has raised up among us many of our most valuable institutions.' *State* v. *Noyes*, 30 N. H., 279, 292, *per Bell, J.*"

In *Trustees of Saratoga Springs* v. *Saratoga Gas, Electric Light & Power Co., supra*, Chief Justice Cullen, after referring to the delegation of powers to municipal bodies, said:

"*I cannot see why, on principle, powers that can be delegated to the administrative officers of a municipality for exercise within the municipality are not equally the subject of delegation to state administrative officers for exercise throughout the state.* This review of the course of legislation and of the judicial authorities in this state I think clearly shows that, while powers inherently and exclusively legislative cannot be delegated, there is a large field in which the Legislature, to quote Chief Justice Marshall's words, 'may certainly delegate to others powers which the Legislature may rightfully exercise itself.'"

In *Brodbine* v. *Inhabitants of Revere*, 182 Mass., 598, Mr. Chief Justice Knowlton, in delivering the opinion of the court, at page 599, said:

"There is a well known exception to it (the rule prohibiting the delegation of legislative power) resting upon conditions existing from ancient times in most of the older states of the

Union, which the constitutions of the states generally recognize, namely, the existence of town or other local governmental organizations which have always been accustomed to exercise self-government in regard to local police regulations and other matters affecting peculiarly the interests of their own inhabitants. On this account the determination of matters of this kind has been held to be a proper exercise of local self-government which the legislature may commit to a city or town. *Commonwealth* v. *Bennett*, 108 Mass., 27; *Stone* v. *Charleston*, 114 Mass., 214; *Opinion of the Justices*, 160 Mass., 586, 589; *People* v. *Albertson*, 55 N. Y., 50; *Gloversville* v. *Howell*, 70 N. Y., 287; *State* v. *Morris County*, 7 Vroom, 72. *How far this principle may be extended in the proper application of it is a subject upon which there is much difference of opinion among judges.* Whether it will justify the creation of a tribunal other than the voters or their usual representatives, where they have a representative government for the management of municipal affairs, seems not to have been much considered by the courts. It is very clear, where the people of a city or town have become so numerous that the management of their municipal affairs can be conducted conveniently only by a representative body like a city council, that municipal legislation such as making ordinances and regulations as to local matters affecting the health, safety and convenience of the people, may be intrusted to the people's chosen representatives in a city government. Hence city councils are usually authorized to pass ordinances, as voters of towns adopt by-laws. In this Commonwealth legislation has gone further than this. *Apparently on grounds of expediency amounting almost to necessity, the making of rules and regulations for the preservation of the public health has been intrusted to boards of health in towns as well as in cities,*

and to a state board of health, and a violation of the rules established by city or town boards has long been and is now punishable in the courts. St. 1816, c. 44, sec. 3. Rev. Stat., c. 21, secs. 1, 5, 6. Gen. Stat., c. 26, secs. 1, 5. Pub. Stat., c. 80, secs. 1, 4, 8, 18. R. L., c. 75, sec. 65. The validity of these statutes, which has long been recognized, stands upon one or both of two grounds. They may be considered as being within the principle permitting local self-government as to such matters, the board of health being treated as properly representing the inhabitants in making regulations, which often are needed at short notice, and which could not well be made, in all kinds of cases, by the voters in town meeting assembled. Perhaps some of these statutes may also be justified constitutionally on the ground that the work of the board of health is only a determination of details in the nature of administration, which may be by a board appointed for that purpose, and that the substantive legislation is that part of the statute which prescribes a penalty for the disobedience of the rules which they make as agents performing executive and administrative duties."

The question suggested by Mr. Chief Justice Knowlton in the above opinion as to how far delegated authority should be extended must on the authorities be answered in such a way as to include all matters relating to the fixing of rates and the regulation of carriers. The exception, which is well recognized by all courts allowing the delegation of power to municipalities, is based upon the grounds of ancient usage and governmental necessity. Both of these considerations, we would submit, apply with equal force to the delegation of such powers to administrative officers. As to ancient usage, we

find that as early as 1691 the English Parliament delegated to the justices of the peace of each county the power to "assess and rate the prices of all land carriage of goods whatsoever" within their respective counties and attached penalties to any violation of the rates so to be established. This act of Parliament reads as follows:

> "Sec. 24, Cap. 12, 3 William and Mary (IX Stat. at Large, p. 154) XXIV.
>
> And whereas, divers waggoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of trade, be it therefore enacted by the authority aforesaid, That the justices of the peace of every county and other place within the realm of England or dominion of Wales, shall have power and authority and are hereby enjoined and required, at their next respective quarter or general sessions after Easter day yearly, *to assess and rate the prices of all land carriage of goods whatsoever, to be brought into any place or places within their respective limits and jurisdictions, by any common waggoner or carrier;* and the rates and assessments so made, to certify to the several mayors and other chief officers of each respective market town within the limits and jurisdictions of such justices of the peace, to be hung up in some publick place in every such market town, to which all persons may resort for their information; and that no such common waggoner or carrier shall take for carriage of such goods and merchandise above the rate and prices so set, upon pain to forfeit for every such offense the sum of five pounds by distress and sale of his and their goods, by warrant of any justices of the peace where such waggoner or carrier shall reside, in manner aforesaid, to the use of the party aggrieved."

It is to be noted that in this act there is no guide established by Parliament for the justices of the peace in fixing rates. In *Trustees of Saratoga Springs* v. *Saratoga Gas, Electric Light & Power Co.*, 191 N. Y., 123, 18 L. R. A. (N. S.), 713, 722, Mr. Chief Justice Cullen, in delivering the opinion of the court, said with regard to the delegation of power under early English statutes:

> "We are now brought to the consideration whether, not the power to enact general laws for the regulation of rates, but the power to prescribe the particular rates to be charged by particular carriers, public service corporations, or other persons engaged in occupations or business affected with the public interest, and so constitutionally subject to regulation as to their charges, is *so inherently and exclusively a legislative power that it is impossible of delegation to other branches of the government.* There is first presented to us the argument resting on history, and it is said: 'It cannot be gainsaid that until very recently the duty (that of imposing rates) was at all times a legislative one. For many centuries Parliament has directly legislated as to the price of products, regulating the selling value of the great staples like wool and food, and even the employment of labor. * * * The earliest known regulation of rates of carriage was by an act of Parliament in 1692.' If by this it is intended to assert that specific rates for commodities, services or labor were prescribed by Parliament alone, my research (which is necessarily limited) leads me to the belief that the statement is incorrect. Legislation fixing the wages of laborers commenced at a very early period in England, and it may be that at that time the act of Parliament in terms fixed the special wage. The matter was the subject of different, and possibly conflicting, legislation until the

time of Elizabeth, when many of the old laws were repealed and a comprehensive statute enacted embracing servants, laborers, artificers, and substantially all of what we would term the wage earning class. Stat. 5 Eliz., 1562, chap. 4. *The statute* (*Sec.* 15) *made it the duty of the justices of the peace in every shire to meet with the sheriff of the county, if it was convenient, and with the mayor of any city or incorporated town, if there were such in the shire, after Easter in each year, and limit, rate and appoint the wages for all artificers, handicraftsmen, husbandmen or other laborer, servant or workman. As far as I can discover, from the time of the enactment of this statute until the regulation of wages ceased to be regarded as a proper subject for state control, wages were fixed, not by act of Parliament, but by the justices of the peace.* This must have been the most extensive, if not also the most important, field of rate making upon which the government ever entered. *The power thus devolved upon the justices of the peace was not conferred on any principle of local self-government which obtains with us, for no such idea prevailed in England, except possibly in the cases of chartered cities or towns to which special privileges were granted by their charters.* The justices of the peace were appointed and removed by the Crown at pleasure, and, like our own, were more administrative than judicial in their functions. *People ex rel. Lawrence* v. *Mann*, 97 N. Y., 530, 49 Am. Rep., 556. *The power was conferred on the justices simply for convenience, or, possibly, of necessity, because at the time of the enactment of the statute the condition of the country, almost devoid of proper highways for the transportation of goods, and with comparatively little communication between the inhabitants of its different parts, must have occasioned great difference in the price of commodities and rates of wages in different localities.''*

He then refers to the statute of William and Mary above set forth and proceeds:

> "These statutes must have remained extant till the close of the eighteenth century, for in an edition of Burns' Justice, published in 1800, much space is devoted to the duty of the justices under them, and an edition of Bacon's Abridgment, published in 1807, mentions them as then in force. Indeed, Sir James Stephen states that the act of Elizabeth was not formally repealed until 1875, though it practically became a dead letter many years before. *Legislation in England prior to the Revolution would, therefore, seem rather to support than to disprove the proposition that details of rate making could properly be delegated to administrative officers.*"

Thus from the earliest times we find that the difficulty of establishing general rules throughout the country was one of the important considerations leading to the delegation of authority to administrative officers. This practice has of necessity become very common in England during recent years In The Government of England, by A. Lawrence Lowell, Vol. 1, page 363, the author says:

> "*Yet it may be doubted whether, with the great extension in the sphere of government, Parliament could be suffered to move at its present pace were it not for the growing practice of delegating legislative power.* We hear much talk about the need for a devolution of the power of Parliament on subordinate representative bodies, but the tendency is not mainly in that direction. The authority of this kind vested in the county councils by recent statutes is small, too small to affect the question. *The real delegation has been in favor of the administrative departments of the central government, and this involves a striking de-*

> *parture from Anglo-Saxon traditions,* with a distinct approach to the practice of continental countries."

The orders entered by the administrative departments of the government under such delegated authority are called "statutory orders." Mr. Lowell says of these:

> "Since 1893 the statutory orders of each year have been regularly published like the Acts of Parliament; and an idea of their number may be derived from the fact that they always fill one, and often two, large volumes, each much thicker than the present emaciated book of the Public General Acts. In spite of the potential control retained by the Houses over statutory orders, *the growing habit of delegating authority to make them involves a substantial transfer of power from Parliament to the executive branch of the government, a transfer due in part to the increasing difficulty in legislation.*"

The modern tendency of leaving governmental functions more and more to administrative bodies has thus manifested itself in England as well as in this country.

As was said by Judge Brewer in *Chicago & N. W. Ry. Co.* v. *Dey,* 35 Fed., 866:

> "While of course the argument from inconvenience cannot be pushed too far, yet it is certainly a matter of inquiry whether *in the increasing complexity of our civilization, our social and business relations, the power of the legislature to give increased extent to administrative functions must not be recognized.*"

We would submit that the English precedents above quoted are in point when discussing the American law upon this subject, for, although the doctrine forbidding delegation of legislative power

is often referred to as if it were based on some express provisions of our written constitutions, it would seem that the practice existed as a principle of Anglo-Saxon jurisprudence prior to and quite independent of any written constitutions. As is said in Locke on Civil Government, Sec. 142:

> "These are the bounds which the trust that is put in them by society, and the law of God and nature, have set to the legislative power of *every commonwealth in all forms of government:*
>
> * * * * *
>
> *The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have.*"

Or, as Judge Cooley puts it in his book on Constitutional Limitations, at page 163:

> "*The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.*"

In *Oregon R. & N. Co.* v. *Campbell, et al.,* 173 Fed., 957, District Judge Wolverton examines at length the historical basis for the doctrine of distribution of governmental powers. He says:

> "The principle of the segregation of the three functions of government was not a concept incident to the Revolutionary times, leading to the adoption of the American Constitution, but a maxim having its outgrowth from the British Constitution."

This principle is closely allied to the one forbidding the delegation of legislative power.

The right to delegate to commissions the power to fix railroad rates has been universally recognized in this country. In *Atlantic Coast Line R. Co.* v. *N. C. Corporation Commission,* 206 U. S., 1 (51 L. Ed., 933), Mr. Chief Justice White, giving the opinion of the court, said:

> "The *elementary* proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or *by administrative bodies endowed with power to that end,* is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

As was said by Judge Severens in *Louisville & Nashville R. Co.* v. *Interstate Commerce Commission, supra,*

> *"The necessity of legislation in such form justifies its adoption; and it is not obnoxious to the Constitution, in that it delegates legislative power."*

In *Chicago & N. W. Ry. Co.* v. *Dey, supra,* Judge Brewer said:

> "There is no inherent vice in such a delegation of power; nothing in the nature of things which would prevent the state, by constitutional enactment at least, from intrusting these powers to such a board; and nothing in such constitutional action which would invade any rights guaranteed by the federal constitution. *So that, after all, the question is one more of form than of substance. The vital question with both shipper and carrier is that the rates shall be just and reasonable, and not by what body they shall be put in force."*

* * * * *

> The reasonableness of a rate changes with the changed condition of circumstances. That which would be fair and reasonable today, six months or a year hence may be either too high or too low. The legislature convenes only at stated periods, in this state once in two years. *Justice will be more likely done if this power of fixing rates is vested in a body of continual session than if left with one meeting only at stated and long intervals.* Such a power can change rates at any time, and thus meet the changing conditions of circumstances."

What, then, is the test in determining this vexed question as to whether a given delegation of power legislative in its nature is or is not void? In *Trustees of Saratoga Springs* v. *Saratoga Gas, Electric Light & Power Co., supra,* Mr. Chief Justice Cullen said:

> "As is well stated in the able prevailing opinion in the court below, the real question in the case is not whether making a tariff of rates is legislative, but whether it is so *exclusively legislative that it cannot be conferred on any other tribunal.*"

This is practically the same test that was laid down by Mr. Chief Justice Marshall in the case of *Wayman* v. *Southard,* 10 Wheat., 1, quoted by Mr. Justice Lamar in *United States* v. *Grimaud, supra,* to the effect that Congress could not delegate "powers which are *strictly and exclusively legislative,* but Congress may certainly delegate to others powers which the Legislature may rightfully exercise itself."

Just before using the language above quoted, Mr. Chief Justice Marshall had referred to the seventeenth section of the judiciary act of 1789, which

provided "that all the said courts shall have power" "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States;" and the seventh section of the act, detailing more at large powers conferred by the seventeenth section. The Chief Justice said: "These sections give the court full power over all matters of practice," and he does not seem to in any way question the validity of such acts, although it is clear that Congress, in vesting this authority in the courts to make rules, did not supply any definite standards which the courts must follow in exercising this authority.

In conclusion, and to sum up the contentions above made, we would submit, first, that there is nothing legislative in its nature in the action of the Commission in passing upon applications under the fourth section; second, that even if it be assumed that such action by the Commission is legislative in kind, still it is not "*strictly and exclusively legislative,*" in the words of Marshall; third, that the rulings of the Commission such as those here complained of are merely "administrative rulings," and in the words of Mr. Justice Lamar, "*the authority to make administrative rules is not a delegation of legislative power;*" fourth, that there is a sufficient standard expressed in the general purpose of the act for the guidance of the Commission, which, in any event, could not exercise its discretion in an unreasonable or arbitrary manner.

IV.

THE CARRIERS, HAVING APPLIED TO THE COMMISSION FOR RELIEF, CANNOT ATTACK BY WAY OF A PETITION FOR INJUNCTION THE RELIEF GRANTED BY THE COMMISSION MERELY BECAUSE IT DOES NOT GO TO THE "EXTENT" THAT THEY ASKED, AND CANNOT CONTINUE TO DISREGARD THE ABSOLUTE PROHIBITION OF THE FOURTH SECTION WHEN THE ONLY AUTHORITY THEY HAVE TO VIOLATE IT HAS BEEN SET ASIDE BY THE COMMERCE COURT. THE COMMERCE COURT HAD NO JURISDICTION OF THE PETITIONS HERE FILED AND NO AUTHORITY TO ENTER ITS FINAL DECREE.

The only jurisdiction over the action of the Commission that is vested in the Commerce Court is to enjoin, set aside, annul or suspend, in whole or in part, any order of the Commission. It is evident that the mere granting of such an injunction would leave the carriers subject to the absolute prohibition of the fourth section, and the Commerce Court, recognizing this fact, not only enjoined the enforcement of the orders of the Commission, but also attempted in effect to suspend the operation of the fourth section, which at the same time the court held to be a valid and constitutional enactment by Congress. It is to be noted that in so doing the Commerce Court granted relief beyond that prayed for in the petitions of the carriers, for they based their prayer for an injunction against the enforcement of the fourth section solely on the ground that it was unconstitutional and void, and did not in their petitions in any way intimate that the Commerce Court

could enjoin the enforcement of that section if it should be held a constitutional enactment.

By its final decree, as above set forth, the Commerce Court enjoined the enforcement by the United States or by the Interstate Commerce Commission of the prohibition contained in the fourth section against the charging of a higher rate for the shorter than for the longer haul until the applications of the carriers—which the Commerce Court held were still pending before the Commission—shall have been disposed of in accordance with the views of the Commerce Court as expressed in its opinion and decree. We would submit that the Commerce Court in making such order exceeded its jurisdiction, and the fact that the court found it necessary to so exceed its jurisdiction in order to make effective its decree is, we believe, persuasive of the view that the whole matter was beyond the jurisdiction of the court. The fourth section itself refers in the proviso to the "determination of the applications by the Commission" and in so doing indicates that the conclusions of the Commission are not to be subject to review by the courts. The orders here entered by the Commission refused the applications by the carriers as to the territory within zone 1 and granted the applications, to a certain "extent," as to the territory in zones 2, 3 and 4. We shall have occasion to point out later in this brief that these rulings of the Commission were of necessity based upon findings of fact which, under numerous recent decisions of this court, cannot properly be disregarded by the courts; but under the present heading we simply wish to discuss the proposition that these carriers, after applying to

the Commission under the proviso of the fourth section, cannot now attack in the courts the relief granted by the Commission; for if they are successful in their attack, they will be left subject to the admittedly constitutional prohibition of the first part of the section against the charging of a higher rate for the shorter haul.

In *Louisville & Nashville R. Co.* v. *Kentucky, supra,* Mr. Justice Shiras, in delivering the opinion of the court, after holding that the act of the Commission in exempting the carrier from the operation of the section, was in the nature of an act of grace as above set forth, said:

> "*If he (the carrier) elects to resort to the Commission, he can no more complain that its judgment is final, when it is against his contention, than the community affected can complain when its judgment is in his favor. Finality is a characteristic of the judgments of all tribunals, unless the laws provide for a review.* Nothing is more common than the appointment of juries or commissioners to find the value of lands taken for public use, or to assess damages to them, whose findings are deemed final. Yet the evidence on which they act is not preserved, nor do the courts go into any inquiry into the various sources and grounds of judgment upon which the appraisers have proceeded. If there are charges of fraud or corruption, the courts may consider them; but it has never been held that the finality of their findings made the action of the appraisers unconstitutional or void. *Shoemaker* v. *United States,* 147 U. S., 282, 305, 37 L. Ed., 170, 187, 13 Sup. Ct. Rep., 361."

As above stated, it will be claimed by the carriers that there is a distinction between these cases, but we do not think that on the question here in-

volved as to the nature of the act of the Commission in granting relief under the proviso or as to the finality of the decision thus rendered, there is any distinction between that case and the two before the court. In the above opinion it is true that this court said: "We are not prepared to accept the view that the railroad commission, in acting under Section 218, is merely an administrative body and as such subject to judicial review;" but this cannot be regarded as an authority, as the carriers contend, for the proposition that all decisions of an administrative body are subject to review by the courts, for this would be in conflict with the doctrine established by this court in numerous recent decisions, including the case of *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western R. Co.*, 220 U. S., 235, and the cases there cited. The Kentucky courts in several cases had before them the construction of the same constitutional provision embodying the long and short haul clause, and such provision was sustained.

In *Louisville & Nashville R. Co.* v. *Commonwealth of Kentucky*, 47 S. W., 598, Mr. Chief Justice Lewis, in delivering the opinion on a petition for rehearing, said:

> "*In our opinion the court has not jurisdiction to either compel the railroad commission*, upon application of the common carrier or those interested in particular industries or callings, *to suspend or relax* * * * *the operation of Section* 218, or upon application of individuals or corporations feeling aggrieved, *to prohibit such suspension or relaxation, in special cases.* While the Commission is thus and

> to that extent free from judicial interpretation, it cannot, of course, nullify or, except in special cases at all suspend, operation of Section 218; and though the railroad commission be vested with this unusual power, it must be treated as a constitutional power with which the courts cannot interfere."

It is evident that under the interstate commerce act, as under the Kentucky constitutional provision, the communities affected would have no right to appeal to the courts if the Commission should grant the carriers applications, and we would submit that the language of Mr. Justice Shiras above quoted, to the effect that if the carrier "elects to resort to the Commission, he can no more complain that its judgment is final when it is against his contention than the community can complain when its judgment is in his favor," applies to the situation that arises under Section 4 of the interstate commerce act as fully as it does to that arising under the Kentucky constitutional provision.

As above stated in this brief in our discussion of the constitutional questions involved, we do not contend that if the action of the Commission was purely arbitrary, there would be no appeal from the decision of the Commission upon an application filed under the proviso of Section 4, but subject to this limitation, we would submit that the courts cannot interfere with such a decision by the Commission. In these cases, the carriers, while making some general allegations that the action of the Commission was purely arbitrary, failed entirely to support or sustain such allegations, admitting on the face of their petitions that the Commission made an in-

vestigation, as required by the statute, and afterward entered the orders here complained of.

Having in view the difficulties above pointed out in the way of granting any effective relief to the carriers by way of injunction, it would seem that the Commerce Court, whose only power under the statute is to enjoin, cannot have any jurisdiction over the decisions of the Commission on the applications of the carriers. While in a technical sense these decisions are orders, they are not, we would submit, orders in the sense that that term is used in the jurisdictional section of the Commerce Court Act, for it must be assumed that the order to which that clause refers were such as could properly be enjoined.

V.

THE JURISDICTION OF THE COMMERCE COURT IS LIMITED TO SUCH ORDERS OF THE INTERSTATE COMMERCE COMMISSION AS WERE WITHIN THE JURISDICTION OF THE CIRCUIT COURTS OF THE UNITED STATES PRIOR TO JUNE 18, 1910. THE ORDERS HERE IN QUESTION COULD NOT HAVE BEEN WITHIN THE JURISDICTION OF SUCH CIRCUIT COURTS PRIOR TO THAT DATE, BECAUSE THEY WERE ENTERED BY THE COMMISSION SOLELY UNDER AND BY REASON OF THE INCREASED POWERS VESTED IN THE COMMISSION BY THE AMENDMENT ADOPTED BY CONGRESS ON THAT DATE.

We would briefly call the attention of the court to the language of the act creating the Commerce Court, which to our minds throws doubt upon the jurisdiction of that court in these and other cases

and which should at least receive judicial construction so that if found defective, proper legislation can be secured from Congress. The language to which we refer is found in Section 1 of the amendatory act of June 18, 1910, and which provides that the Commerce Court "shall have the jurisdiction *now possessed by the Circuit Courts* of the United States and the judges thereof over all cases of the following kinds. * * * Second: Cases brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. * * * *Nothing contained in this act* shall be construed as enlarging the jurisdiction *now possessed* by the circuit courts of the United States or the judges thereof that is *hereby transferred* to and vested in the Commerce Court."

By the new judiciary act which went into effect January 1, 1912, Congress provided, in Section 211, "The Commerce Court shall have the jurisdiction possessed by the circuit courts of the United States and the judges thereof immediately prior to June 18, 1910, over all cases of the following kinds."

The same act that created the Commerce Court and contained the above limitation upon its jurisdiction admittedly increased the powers of the Commission, and, by the change made in Section 4, required the carriers in all instances to make applications to the Commission before violating the absolute prohibition of the long and short haul clause. (Opinion of Judge Mack, pp. 10-11, Rec. 883, p. 343.) In this respect a radical change was made, for under the decisions of this court in *Louisville & Nashville R. Co.* v. *Behlmer,*

175 U. S., 649, *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S., 1, and other cases there cited, Section 4 had been so construed as to make it unnecessary in any case for the carrier to make application to the Commission for relief from the provisions of the fourth section. If the circumstances and conditions were in fact dissimilar, the fourth section, as a matter of law and not by reason of any action of the Commission, was held to be inoperative; if, on the other hand, the circumstances and conditions were similar, the carriers could not ask for relief—and it could not be granted if asked—for under those circumstances the charging of a higher rate for the shorter distance would clearly be an undue discrimination under the provisions of Section 3. An examination of the interstate commerce reports discloses that after the decision of the *Alabama Midland* case in 1897, no applications for relief were filed by the carriers until after the amendment of June 18, 1910. As stated by Commissioner Prouty in the decision of the case here pending: "That provision of the section authorizing the Commission to prescribe the circumstances under which carriers may depart from the rule of the section and the extent of that departure, could be given no practical effect."

In the case *In re Louisville & Nashville R. Co.*, 1 I. C. C., 59, Judge Cooley said:

> "But beyond question the carrier must judge for himself what are the substantially similar circumstances and conditions which preclude the special rate, rebate or drawback which is made unlawful by the second section, since no

> tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences; but the special rate, rebate or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it, and, as Congress clearly intended this, it must also when using the same words in the *fourth section* have intended that the carrier whose privilege was in the same way limited by them should in the same way act upon its judgment under limiting circumstances and conditions."

This portion of the opinion was quoted with approval by this court both in the *Alabama Midland* case and the *Behlmer* case and we would submit that under the original fourth section, as construed by this court, the Commission had no jurisdiction to entertain applications by the carriers for relief thereunder. It follows from this that the very subject matter involved in these suits could not have arisen prior to the amendment of June 18, 1910. The limitation contained in the Commerce Court Act above quoted of course refers not to a special case but to a class of cases, but when it appears, as here, that the whole class of cases to which this particular one belongs could not have arisen prior to June 18, 1910, and so could not have been within the jurisdiction of the circuit courts prior to that date, it follows, we would submit, that such class of cases cannot, under the peculiar language employed by Congress in this section, be held to be within the jurisdiction of the Commerce Court. If Congress intended to give the Commerce Court jurisdiction over all the orders of the Commission, it

could have easily expressed its purpose, and would probably have accomplished it, by simply omitting the special limiting clauses above qquoted, but for some reason Congress chose to insert this clause expressly providing that "*nothing contained in this act*"—which of course includes the provisions above referred to, increasing the jurisdiction of the Interstate Commerce Commission—"shall be construed *as enlarging* the jurisdiction *now possessed* by the circuit courts that is *hereby transferred* to and vested in the Commerce Court."

If it had been intended merely to limit *the powers* of the Commerce Court in dealing with cases *within its jurisdiction* to such powers as belonged to the Circuit Courts prior to June 18, 1910, Congress should it would seem have used language like that in the 12th paragraph of Section 1 of the Commerce Court Act. This 12th paragraph provides as follows:

> "In all cases *within its jurisdiction the Commerce Court*, and each of the judges assigned thereto, *shall*, respectively, *have and may exercise any and all of the powers* of a circuit court of the United States and of the judges of said court, respectively, so far as the same may be appropriate to the effective exercise of the jurisdiction hereby conferred."

For some reason Congress limited not the *powers* but the *jurisdiction*—the fundamental authority to hear and determine the subject matter of any suit—to such jurisdiction as was possessed by the Circuit Courts prior to June 18, 1910.

It does not we think dispose of this contention to say that if the amendatory act of June 18, 1910, had

contained none of the provisions relating to the Commerce Court the powers of the Circuit Court would automatically have been increased to cover any new class of orders that might be entered by the Commission under the increased powers conferred upon the Commission by the amendatory act. That may well be. The circuit courts possessed general jurisdiction under the judiciary act to hear all cases in equity arising under the laws of the United States. No such general grant of jurisdiction to the Commerce Court is found in the act, but on the other hand its jurisdiction is expressly limited to such jurisdiction as the circuit had, not *after*, but *prior to June 18, 1910.*

For these reasons we would submit that the word "orders" as used in the jurisdictional section of the Commerce Court Act cannot be construed as including orders of a class that could not have been entered by the Commission prior to June 18, 1910, and therefore could not at that time have been subject to the jurisdiction of the circuit courts.

VI.

THE COMMERCE COURT ERRED IN HOLDING THAT THE COMMISSION IN GRANTING THE APPLICATION OF A CARRIER FOR AUTHORITY IN A SPECIAL CASE TO CHARGE MORE FOR THE SHORTER THAN FOR THE LONGER HAUL MUST CONFINE ITS ORDER TO ABSOLUTE RATES, AND MUST FIX A REASONABLE RATE FOR THE SHORTER HAUL. WE WOULD SUBMIT THAT THE COMMISSION HAS AUTHORITY TO IMPOSE AS A CONDITION TO THE RELIEF GRANTED THE REQUIREMENT THAT THE RATES TO BE ESTABLISHED BY THE CARRIER FOR THE LONGER AND THE SHORTER HAUL SHALL MERELY BEAR A CERTAIN RELATIONSHIP TO EACH OTHER AND CAN RESERVE THE RIGHT TO DISAPPROVE OF ANY PARTICULAR RATES WHICH MIGHT BE ESTABLISHED BY THE CARRIERS UNDER THE PERMISSION GRANTED, IF UPON COMPLAINT OR FURTHER INVESTIGATION THEY SHOULD BE FOUND TO BE UNREASONABLE OR DISCRIMINATORY UNDER THE OTHER SECTIONS OF THE ACT.

The Commerce Court held that the orders of the Commission were invalid because they attempted to fix a relation of rates determined by percentages as to certain territorial zones, without any regard to any definite schedule of rates. Judge Mack, in delivering the opinion of the Commerce Court, said at page 9:

> "The orders sought to be enjoined do not establish absolute rates for either the long or short haul or prescribe the extent, in dollars and cents, that the short-haul rate may exceed the present or some definitely fixed long-haul rate, but they do establish a relation between

any long-haul rate that the carrier may put into effect and the short-haul rate, determining that from zone one the western short-haul rate shall not exceed the long-haul rate, and that from zones two, three and four, the short-haul shall not exceed the long-haul rate by more than 7 per cent., 15 per cent. and 25 per cent., respectively" (Rec. 883, p. 342);

and at page 14:

"But the order of the Commission as to this territory is not limited to a denial of the applications in the form in which they were presented—that is, to a denial of the maintenance of the then prevailing rates to the coast concurrently with higher rates to the interior points. It forbids the carrier to maintain *any* coast rate lower than the contemporaneous intermediate rate from these points. *In other words, if the carrier from St. Paul, in order to meet new water competition from New York, should reduce the St. Paul-Seattle rate* to a point less than at present and less than a rate reasonable *per se*, but nevertheless somewhat remunerative, it would be compelled, under this order, to grant the same rate to the interior point, even though, under these circumstances, a reasonable rate to the interior point higher than the unreasonably low rate to the coast point forced upon the carrier by such market competition under penalty of losing the business would not be in violation of Section 1 or of any other provision of the act" (Rec. 883, pp. 344-345);

and at page 17:

"*In so far as the Commission attempts thus to determine the relation of the long and short-haul rates, irrespective of absolute rates, it goes beyond any authority that has been vested in it*, for it is not in the power of the Commission to say that 100 per cent., 107 per cent., or any given

> percentage of an unknown, less than reasonable, rate to the coast is necessarily a maximum reasonable and non-discriminatory rate from the same point of origin to an interior point." (Rec. 883, p. 346.)

It would seem that if the order of the Commission had been limited to subsisting coast rates, it would have been sustained by the Commerce Court at least so far as it related to zone one, for Judge Mack at page 13, said:

> "The Commission also found, however, that the present Pacific Coast rates from zone one had not been proven by the carriers, upon whom the burden was laid, to be less than reasonable *per se*. *Assuming that they were fully reasonable per se, the Commission would have the power to refuse exemption from the long and short-haul requirement*, for under these circumstances any higher rates to intermediate points could be condemned as unreasonable and thus in violation of Section 1 of the act." (Rec. 883, p. 344.)

It is important to note this statement that the Commission found that the carriers had not sustained the burden of proof in their attempt to show that the rates to the Pacific coast are less than reasonable *per se*. Such finding disposes of the allegation in the petitions of the carriers that the present coast rates have been forced by water competition down to a point where they are less than reasonable. We would submit that this court will hold the finding of the Commission rather than the allegation in the carriers' petitions true.

The Commerce Court also held that in passing on an application by a carrier under the proviso of Sec-

tion 4 it was the duty of the Commission at the same time to fix a reasonable short-haul rate in accordance with the requirements of Section 1 of the act. Judge Mack said, at page 15:

> "In granting authority to make an absolute long-haul rate lower than some short-haul rate, *the Commission would* have the power and *the duty* to prevent a violation of section 1 and, by *virtue of its authority to determine reasonable rates, to fix the short-haul rate.*" (Rec. 883, p. 345.)

We do not think that the construction so placed upon this section and the proviso by the Commerce Court is correct.

While it was the purpose of Congress to lay down a general rule of prohibition in the fourth section, it recognized that such rule would in some exceptional cases work a hardship and accordingly authorized the Commission upon applications made by the carriers to investigate such cases and to allow exemptions from this rule. In the debates in the Senate upon the Cullom report submitted January 18, 1886, the Chairman of the Committee said:

> "It is agreed that this is the principle that should be observed as a general rule. The committee found, however, that the principle was not of universal application, but there were cases in which the railroads were compelled to make lower rates for longer than for shorter distances by the great law of competition, which is stronger than any law we can make, and that in some cases it would be a great hardship for the public as well as the railroads to rigidly enforce the general principle."
>
> *In re Louisville & Nashville R. R. Co.*, 1 I. C. C. Rep., at 75.

In *Railroad Commission of Georgia* v. *Cylde Steamship Co. et al.*, 5 I. C. C. Rep., 324, Commissioner Knapp, now Presiding Judge of the Commerce Court, said at page 399:

> "But if hardship be encountered, then relief, temporary and continuing, may on proper showing be obtained under the proviso of the fourth section."

The proviso remained as first enacted until the amendment of June 18, 1910, and the principal change made by that amendment in the proviso is found in the addition of the following words:

> "Provided, further, *that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.*
>
> Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

This clause now forms what may be termed the second proviso of Section 4. Here, as in the original proviso, we see evidence of the purpose of Congress to avoid the hardships that might be incident to a strict enforcement of the long and short-haul rule. Congress evidently realized that at the time

of the amendment in June, 1910, there were many thousand rates in force by the carriers that violated this rule, and that to require the carriers to instantly adjust such rates in accordance with that rule would cause great loss and inconvenience, both to the carriers and to the public.

Many of these rates that had been perfectly lawful under the original fourth section by reason of the existence of dissimilar circumstances and conditions, were instantly rendered unlawful when these qualifying words were stricken out of the section. The hardship that would thus have been imposed upon the carriers would have been greatly accentuated by the change made by the same amendatory act in Section 15. Prior to June, 1910, rates when once filed with the Commission were held to be *prima facie* lawful and continued to be so regarded until they were found to be unlawful by the Commission. Under Section 15 as amended this was changed and if a complaint was made upon the filing of a new schedule of rates, the new rates were suspended and the carriers were required to prove their reasonableness. The difficulty in the way of the carriers in establishing new rates was thus greatly increased by the shifting of the burden of proof under Section 15, and at the same time the change in the first part of Section 4 made it absolutely imperative for the carriers either to file with the Commission an enormous number of new rates—and under the amended section to substantiate their reasonableness if any complaint was made—or to make application to the Commission for leave to continue the existing rates in force, though in violation of the absolute long and

short haul rule. Congress, we believe, fully recognized this difficulty and, starting with the same presumption which had governed its action in amending Section 15, to-wit, that all existing rates were *prima facie* lawful, it said in effect to the carriers—"You need not change these 'lawfully existing' rates for six months in any event, and even thereafter not until the 'determination of your applications by the Commission.' " In the cases here pending it appears that shippers and communities had long complained of rates to the points here involved, but many rates that were in existence at the time of the adoption of the amendatory act and which were rendered unlawful by reason of the striking out of the words above quoted had never been complained of by shippers or investigated by the Commission. Such rates may have been so clearly just and reasonable when the competitive conditions at the more distant point were taken into consideration that no one had ever thought to criticise them, still they were made unlawful by the change in the first part of Section 4, and we must assume that Congress had such rates as these, as well as those forming the more glaring violations of the long and short haul clause, in mind when it added this carefully worded second proviso. We would submit that the Commission in reaching its "determination" on such applications, should not be required to pass upon the question of the reasonableness of all the rates involved, a question which, as above stated, may never have been raised either by complaint from a shipper or on investigation by the Commission itself. This question can more properly be raised thereafter and be finally passed upon

if complaint is filed with the Commission with regard to any rates initiated by the carriers under the permission granted to depart from the absolute rule of the fourth section. What Congress evidently contemplated by enacting this second proviso was to give the carriers expeditious relief from what would otherwise have been a great hardship brought about by the two changes in Section 4 and Section 15 by the amendatory act.

We are informed by the 25th annual report of the Commission, recently issued, that within the six-month period limited in the proviso, 5,030 applications for relief from the fourth section were filed by the carriers. Of these the Commission says:

> "Many of these applications are exceedingly voluminous and intricate, involving thousands of rates and many different questions."

The Commission comments on the fact that these applications exceed the whole number of formal complaints (4750) which have been filed with the Commission during its entire existence. (25th I. C. C. Annual Report, pp. 20, 21.)

In re Louisville & Nashville Railroad Co., 1 I. C. C. Rep., 31, contains the opinion of Judge Cooley concerning the proper construction of Section 4 as it existed prior to the amendment of June, 1910, which opinion has been repeatedly referred to with approval by this court. It appears on page 56 of said opinion that one of the considerations that led Judge Cooley to adopt the view which was subsequently approved by this court—that the carriers were not required to make application to the Commission for exemption from the prohibition of the

long and short-haul rule when the conditions at the more distant point were dissimilar—was found in the fact that, as Judge Cooley foresaw, the time of the Commission would be very largely taken up in the investigation of such applications if it should be held that the carriers must in each instance make application to the Commission. As Judge Cooley said, passing on such applications would

> "in any considerable state be an enormous task. In a country so large as ours and with so vast a mileage of roads it would be superhuman. A construction of the statute which would require its performance would render the due administration of the law altogether impracticable, *and that fact tends strongly to show that such a construction could not have been intended.*"

He further says:

> "Assuming, as we must, when the law provides for it, that it is important to the public interest that a privilege to charge more for the shorter haul than for the longer, over the same line, in the same direction, should be admitted in some cases, as had been the custom, *the interruption of the privilege,* when the case was proper for it, *would presumptively cause mischief and should not therefore be compulsory while the slow processes of an investigation were going on,* especially as the particular investigation might itself be compelled to await the determination of many others."

While it is true that by the amendment of June, 1910, the words "under substantially similar circumstances and conditions" were omitted from the first part of the fourth section and the force of said section was therefore materially changed from what it was when Judge Cooley was passing upon it, it would

seem that the same considerations which he then had in view should be applied in arriving at the proper construction of the act in its amended form. It is clear that if the Commerce Court is right in holding that the Commission, in passing upon each of these 5,030 applications, must make such full investigation as would be necessary in order to enable it to intelligently fix in each instance a reasonable rate for the shorter haul, the time of the Commission will be largely taken up in disposing of applications for relief under the proviso of Section 4. Up to the date of the annual report, December 20, 1911, the Commission had entered only 450 orders on the 5,030 applications filed prior to February 17, 1911. (Annual Report, p. 4.)

The experience of the commission in this particular seems to threaten to develop into as serious a situation as that which confronted the Railroad Commission in Kentucky. In that state, as above pointed out, there is in the Constitution a long and short-haul clause identical with the original 4th section of the Interstate Commerce Act. In the discussion in the Senate of the amendment of June 18, 1910, Senator Lodge quoted the following statement concerning the situation in Kentucky:

> "So numerous did the applications to the commission become that after several years the commission became convinced that practically every long and short-haul adjustment which had existed was justified by legitimate and controlling competition, and therefore, in order to grant general relief and put an end to the constant importunity for special relief from places embarrassed by the prohibition, *the commission*

> *finally issued a blanket order, which in effect authorized the making of less rates for longer hauls in all cases* where legitimate and controlling competition justified such adjustment. Thus the situation was finally returned to what it was at the outset, the railroads charging only just and reasonable rates for the short hauls, but charging for the longer hauls such less rates as were necessitated by controlling competition." (Vol. 45 Congr'l Record, Part 6. p. 6013.)

That there is nothing in the language of Section 4 itself which would require the Commission, in passing upon applications of the carriers for relief under the fourth section, to go on and fix reasonable rates, is clear. That section merely provides that the applications can be passed upon by the Commission after investigation, and apparently this investigation could be entirely *ex parte*, there being no provision requiring the giving of notice to any interested shippers or communities. The provisions found in the other sections of the act, such as Sections 13 and 15, clearly relate to proceedings upon complaint filed or investigation undertaken by the Commission on its own motion, and do not relate in any way to proceedings upon applications filed by the carriers under Section 4. We are aware that there are expressions in the reports filed by the Commission in connection with these orders which are not in accord with the view here advanced, but while we cannot concur with some of the reasoning of the Commission in those opinions, we believe that the orders entered are valid and we think it unnecessary to discuss at this time those portions of the opinions of the Commission which are not directly here involved.

That the proceeding before the Commission upon an application made by the carrier under Section 4 was of a totally different character from that of a proceeding upon complaint filed was early recognized by the Commission. Commissioner (now Presiding Judge) Knapp, in *Railroad Commission of Georgia* v. *Clyde Steamship Co. et al., supra,* said at page 403:

> *"To stand upon one's right under the law is one thing, and to obtain relief by process of law is another. Ordinarily the Commission should not alter the standing of parties in proceedings before it.* When upon complaint under the thirteenth section of charges alleged unlawful under the rule of the fourth section, the carrier avers substantial dissimilarity in circumstances and conditions as justifying the greater charge for the shorter distance, it is concluded by its pleading, and must affirmatively show that the circumstances and conditions of which it is entitled to judge in the first instance are in fact substantially dissimilar. *But upon an application under the fourth section proviso the carrier is the petitioner, not the respondent;* it is not limited by the terms of the rule, and may present to the consideration of the Commission every material reason for an order in its favor. *And upon investigation of the matter the Commission is not confined to issues made by pleadings,* but may, among other things, examine into the legality of rates on competing lines. *The Commission may for cause shown on such an application institute on its own motion a collateral proceeding for the purpose of correcting apparently unlawful rates on the competing line, and pending the proceeding grant temporary relief to the petitioning carrier."*

We think the distinction here made an important one. While undoubtedly a shipper can—as has often

been done—file a complaint under Section 13 alleging a violation of Section 4 and making the carrier a respondent in such proceeding, this does not in any way justify the conclusion that when a carrier is himself the petitioner under Section 4, the Commission would have the duty to proceed as if a complaint had been filed under Section 13. As Judge Knapp said, "The Commission should not alter the standing of parties in proceedings before it," and, as he further pointed out, the Commission could undoubtedly institute "a *collateral proceeding*," under Section 13 for the purpose of correcting apparently unlawful rates on the competing line,—and we would submit also, on the line of the petitioning carrier,—and "pending such proceeding, could grant temporary relief to the petitioning carrier," under Section 4. This, it will be observed, is a totally different method of procedure from that which the Commerce Court now holds should have been followed, for that court holds that, instead of granting the petitioning carrier "temporary relief" under Section 4—pending such proceeding upon complaint under Section 13 as the Commission may choose to institute as to the lawfulness of any particular rates, it is the duty of the Commission to postpone all relief of the carrier under Section 4 until it has fully investigated and definitely fixed reasonable rates at least for the shorter haul.

It is perhaps not without significance that Section 15 of the act, authorizing the fixing of rates by the Commission, requires that a "full hearing" be held, while in Section 4 only an "investigation" is prescribed—an investigation which, within the reasonable discretion of the Commission can apparently

be conducted by it in such manner as it may see fit. As Judge Knapp said (*supra*), "upon investigation of the matter, the Commission is not confined to issues made by pleadings." The wide discretion which Congress intended to vest in the Commission is we think indicated by the debates in Congress and the construction that has heretofore been placed upon this section by the Commission and the courts.

When the Interstate Commerce Act was originally introduced in the Senate by the Cullom committee, what is now the proviso of the fourth section read as follows:

> "Upon application to the Commission appointed under the provisions of this act, such common carriers may, in special cases, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may, from time to time, make general rules covering exceptions *to any such common carrier in cases where there is competition by river, sea, canal or lake*, exempting such designated common carrier from the operation of this section of this act; and when such exceptions shall have been made and published, they shall have like force and effect as though the same had been specified in this section."

In the debate that followed the introduction of this bill Senator Cullom moved that the words above underlined should be omitted on the ground that they were unnecessary and that without them the Commission would have more power. "Senator Harris favored the amendment as giving a broader *discretion* to the Commission and it was adopted." *In re Louisville & Nashville R. Co.*, 1 I. C. C., 31, at pp.

75, 76. In this same case, at page 58, Judge Cooley said:

> "The proviso was perfectly intelligible so long as the leading clause contained a hard and fast rule against charging more for the shorter than for the longer haul. It was then obvious that a *discretion was left to the Commission in the matter of relaxing the rule when different circumstances and conditions rendered such relaxation in its judgment proper.*"

And at page 76:

> "It is perfectly clear that the intention of the original framers of the Senate bill was, to leave it to *the discretion* of the Commission, to exempt carriers from the operation of the rule in cases when the 'great law of competion' made such a relaxation proper, having in view the interests of the carriers and the people."

And at page 77:

> "It is obvious, therefore, that, in the house as well as in the Senate, it was understood that the existence of competition was intended to be included in the *margin of discretion* provided for by the Senate measure."

In *Railroad Commission of Georgia* v. *Clyde Steamship Co. et al.*, 5 I. C. C. Rep., 324, Commissioner Knapp, now presiding judge of the Commerce Court, said at page 390:

> "In the framing of the fourth section it appears that a proviso of this character was made a part of it before the words "under substantially similar circumstances and conditions" were inserted in the preceding general rule. The debate indicates that the then object of the proviso was to give the Commission *substantially discretionary power* to relieve carriers from the operation of the general rule."

And at page 394:

> "Under that proviso there *seems to be no limitation upon the power of the Commission to grant relief when, upon consideration of all the facts,* the Commission is satisfied 'that the interests of the commerce of the country and common fairness to the common carriers require that an exception should be made.'
>
> It is difficult to see why this proviso is not broad enough to enable the Commission to relieve all cases of hardship under the fourth section arising from competition between carriers subject to the act, including many of the embarrassments now felt by American carriers in competition with Canadian carriers which may be subject to the act in respect to the traffic competed for."

Indeed, although the Commission itself, in the opinions filed in connection with the orders now under attack, announced the limitations upon the Commission's discretion, which were adopted by the Commerce Court, the Commission has, it would seem, passed upon other applications filed by carriers under the proviso since the amendment of June, 1910, without applying such limitations. For example, on page 25 of the 25th Annual Report it appears that many applications have been filed by carriers for exemption from the fourth section in cases where the absorption of the switching charges at the more distant competitive point had made the rates lower there than at the intermediate non-competitive points where the charge had not been absorbed by the carriers. The Commission granted the exemptions for the reason, as stated by the Commission in its report, that it believed the carriers

would in the future extend the practice of absorbing the switching charge at the intermediate points. It would seem that the Commission here exercised its *discretion* and based its conclusion upon its belief as to what the carriers would, as a practical matter, do in the future.

We do not find any decisions of the courts which would so limit the discretion vested in the Commission as to require it in passing upon an application filed by the carrier under Section 4, to apply only the tests laid down in Sections 1 and 3, and in that proceeding to fix a reasonable rate for the shorter haul. In *E. T. V. & G. R. Co.* v. *I. C. C.*, 181 U. S., 1, Chief Justice White at page 17 said:

> *"It is not difficult to perceive the origin of the fallacy upon which the contention rests. It is found in blending the 3rd and 4th sections in such a manner as necessarily to destroy one by the other, instead of construing them so as to cause them to operate harmoniously."*

In this case the proceeding before the Commission was upon a complaint alleging violations of sections 3 and 4, and the Commission found as appears at pages 8 and 9 of the above opinion, that there had been a violation of the prohibition of the long and short haul clause, which the Commission ordered discontinued. The Commission, however, intimated to the carrier that it might apply for relief under the proviso, and that in considering said application it would pass upon the reasonableness of the rates involved. Whether or not it was this particular method of procedure which this court condemned as an unauthorized blending of the third and fourth sections, we would submit that the language of Chief

Justice White above quoted aptly describes the fallacy of the Commerce Court in these cases. Of course the fourth section since the amendment does not read as it did at the time of the decision of the *East Tennessee* case, but we do not see how the omission of the words stricken out by the amendment can in any way affect the force of this ruling by the Chief Justice.

By holding that the Commission must fix reasonable rates when passing upon an application under section 4 the Commerce Court would, we submit, defeat the very purpose for which the proviso in section 4 was enacted. It contemplates *expeditious*—though it may be only temporary—relief, especially in so far as it relates to the continuation of rates "lawfully existing" at the time of the adoption of the amendment of June, 1910. Prior to this amendment, the carriers could at their peril establish rates that were in violation of the long and short haul clause, but in so doing they assumed the risk of proving that the circumstances and conditions were substantially dissimilar. Under this section as it existed prior to the amendment, no necessity rested upon the carriers to make application to the Commission, for, as this court held, the fourth section, as a matter of law, had no application if, in fact, the circumstances and conditions were dissimilar. (*E. T., V. & G. R. Co.* v. *I. C. C., supra*, and cases there cited.) Rates so established by the carriers were of course subject to investigation by the Commission, either upon complaint of the shipper or upon the Commission's own motion, and in the proceeding thus instituted the Commission

could, upon an investigation of the facts, find that the carrier had been wrong in its assumption and that the circumstances and conditions were not substantially dissimilar, and that therefore the rates were in violation of Section 4, as well as in violation of Section 3. When Congress by the amendment of June, 1910, changed all this by striking out in the first part of the section the words "under substantially similar circumstances and conditions" and made it necessary in the future for the carriers to apply to the Commission for relief from the absolute prohibition of the long and short haul clause, Congress, as a safeguard against undue hardship, authorized the carriers to continue for the time being the rates which were then in force and which, up to the time of that amendment, were presumed, under the terms of the Interstate Commerce Act, to be *prima facie* reasonable and just. If the Commission grants the permission to further continue these rates, the carriers are placed in substantially the same position that they occupied prior to the adoption of the amendment. They could continue these rates, but subject to the power of the Commission, upon complaint and investigation, to hold them invalid and to order their discontinuance. It is clear that if—as the Commerce Court holds—the Commission is bound, in passing on these applications, to have the "*full hearing*" that would be necessary to enable the Commission to fix reasonable rates, the relief which could be granted to the carriers under this second proviso would by no means be expeditious, and, as Judge Cooley said *in re Louisville & Nashville R. Co.* (*supra*), "*the in-*

terruption of the privilege" to which the carrier was entitled *"would presumptively cause mischief" and would be "compulsory while the slow processes of an investigation were going on."*

The proviso in Section 4 authorized the Commission "from *time to time* to prescribe the extent to which such designated carrier may be relieved from the operation of this section." It is in accord with the provision in Section 15 of the act, to the effect that all orders of the Commission "shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, *unless the same shall be suspended or modified or set aside by the Commission,* or be suspended or set aside by a court of competent jurisdiction."

Acting under the amended fourth section, the Commission, by its order of October 14, 1910, above mentioned, prescribed certain rules for the carriers to follow in applying for relief from this section. By this order it was expressly stated,

> "The Commission does not hereby approve any rates or fares that may be filed under this permission, all such rates and fares being subject to complaint and investigation, and correction if they conflict with any other provisions of this act."

The carriers, according to the express allegations of their petitions herein (paragraph XII of petition, in the Atchison & Topeka case and paragraph XI in petition in the Union Pacific case) *"in obedience to the said Commission's order,* felt constrained, because of the penalties in said Act to

Regulate Commerce against any violation of any of the provisions thereof, to file and did file with the Interstate Commerce Commission, within the time allowed by said act as amended, applications for leave to continue in effect said existing lower rates for the longer haul to the Pacific coast terminals than the just and reasonable rates fixed by their tariffs for the shorter haul to said intermediate points," each of these applications expressly stating that it was "based upon the desire of the interested carriers to continue the *present method* of making rates lower at the more distant point than at the intermediate points." It therefore appears that the carriers were advised by the order of the Commission of October 14, 1910, under which these applications were filed, that the Commission in passing thereon would not approve any specific rates, *and the real purpose of the carriers seems to have been, as stated by them, to secure the Commission's approval of "the present method of making rates," rather than of any absolute rates.* The orders here complained of like the general order of October 14, 1910, made similar express reservations on the part of the Commission, of the right to pass on any rates that might be established by the carriers under the Commission granted.

By the order of June 22, 1910, which was limited to Spokane and four other intermountain points, the Commission did, to be sure, name a definite period, to wit, two years, within which the carriers were prohibited from violating the orders establishing these particular percentages; but in view of the provisions of the act above quoted and the express

reservations made in its orders by the Commission, it would seem clear that the Commission reserved the right to modify its rulings on these applications and to alter the particular percentages there prescribed, if such action on its part should become necessary, either because of further information as to the present situation or of future changes that might arise. The other order of July 31, 1911, which covered all intermountain points on the lines of the petitioning carriers contained no reference to any period of time for which it should remain in force.

The carriers profess to fear that, even though there should be greatly increased water competition at the Pacific coast terminals, they would not be permitted by the Commission to make a greater difference between their rates to the coast and to the intermediate points than the percentages authorized in these orders. The Commerce Court commented upon this, and evidently considered this one of the serious defects in the orders, they being of the opinion that if new water competition—for instance, such as will follow the opening of the Panama Canal—should further force down Pacific coast terminal rates, the carriers would be bound by these orders to correspondingly reduce their rates to the intermediate points, although by so doing they might be obliged to establish rates that were less than reasonable. We would submit that there is not a word in the orders of the Commission or in the reports accompanying them that indicate that such would be the case. On the contrary, it is perfectly clear, we think, that *the Commmission by these orders was dealing only with present condi-*

tions of competition and that if new conditions such as those above indicated should arise, the Commission would grant the carriers further relief. In the opinion filed (21 I. C. C. Rep., p. 426), Commissioner Prouty said:

> "The statute does not in terms define the proceeding in which the Commission may inquire into alleged violations of the fourth section and grant the relief as specified in the proviso, but it is clear that any order which the Commission makes in that respect *must be at all times subject to modification by it.*"

In the 25th annual report of the Commission, p. 40, recently issued, the Commission said:

> "Upon the other hand, it should be noted that the opening of the Panama Canal may so add to the intensity of this water competition as to *call for some modification of the conclusions now reached.*"

The very language of the fourth section itself would seem to require such continuing control of this matter by the Commission. The proviso states that the Commission is to "prescribe *from time to time* the extent" to which the carrier shall be relieved from the fourth section. We would submit, therefore, that this "new water competition" which gives the carriers and the Commerce Court so much concern, has no bearing whatever upon the legality of the present orders. It will be time enough to complain of the action of the Commission if, after such new conditions have arisen and applications for further relief from the fourth section have been filed, the Commission refuses to grant such relief as the carriers may then be entitled to.

The mere fact that the Commission has in these orders named certain percentages which, as the Commerce Court says, are to govern "*any* rates" and are quite irrespective of any absolute rates now established, does not seem to us to be significant. It apparently is not contended by any one that the Commission has any power to fix a minimum below which the carriers should not be permitted to go in establishing rates to the Pacific coast terminals. If by this order the Commission had merely fixed definite maximum rates at the intermediate points (for example, rates exceeding the present coast rates by only the amount of the percentages prescribed), it is conceivable that the carriers might of their own motion have further reduced the rates to the coast terminals, even though there were no new competitive conditions, thus perpetuating the very discrimination against the intermediate points which the fourth section was passed to correct. Having in view the evil which the Commission sought to remedy, it is hard to see what form of order other than that adopted by it the Commission could have passed within the authority conferred upon it by Congress. It is clear that merely fixing reasonable rates to the intermediate points, as suggested by the Commerce Court, would not have achieved the desired result and besides, as we submit under our next heading, would have been beyond the power of the Commission.

VII.

IF THE COMMISSION WHEN ACTING UPON APPLICATIONS FILED BY THE CARRIERS UNDER SECTION 4 HAD FIXED FOR THE FUTURE REASONABLE RATES FOR INTERMEDIATE POINTS—AS THE COMMERCE COURT HOLDS WAS THE DUTY OF THE COMMISSION—IT WOULD HAVE EXCEEDED ITS POWER, FOR IT CAN ONLY INITIATE RATES FOR THE FUTURE UNDER THE PROVISIONS OF SECTION 15 UPON COMPLAINT FILED OR INVESTIGATION INSTITUTED UPON ITS OWN MOTION.

The carriers, in their brief filed before the Commerce Court, attack these orders of the Commission on the ground that they had initiated rates for the future and that the Commission had no authority to do this when acting under the proviso of section 4. We cannot agree with the contention of the carrier as to the effect of these particular orders, though we do agree with their contention as to the want of authority on the part of the Commission to prescribe rates for the future under section 4. We would submit that the Commission in these orders carefully avoided any appearance of initiating rates, it left that matter wholly with the carriers, to whom it belonged.

As above stated, the Commission did in the more limited of the two orders, that of June 22, 1910, referring to Spokane and four other intermountain points, require the carriers to "cease and desist" for a period of two years, from charging rates to these named points that should exceed the named percentages contemporaneously in effect to the coast

terminals by more than the named percentages; but even in this order, the Commisison makes it perfectly plain that it is not attempting to prescribe any definite rates for the future, but is leaving the initiation of all rates to the carriers themselves, subject to the power of the Commission to correct any rates so initiated.

This order concludes with the following clause:

> "And it is further ordered that this case be reserved for such further order upon the present findings or for such further investigation as may be necessary to secure to the complaining localities above specified, just and lawful rates, if in view of the rates established in accordance with this order, further proceedings seem necessary."

It is to be noted that this language differs from that used in the other and more general order of July 31, which covers all points in the intermountain territory on the lines of the petitioning carriers. This order has the following concluding clause:

> "The Commission does not hereby approve any rates that may be established under this authority, all such rates being subject to complaint, investigation and correction if they conflict with any other provisions of the act."

The distinction between the two orders seems to be based on the fact that the former and more limited one was entered upon a complaint filed by shippers and issues joined while the latter and general order was as it expressly states based solely upon the applications of the carriers. It may be that in the former case the Commission could, as it intimates, later on fix reasonable rates, because there was a complaint then pending, but we would submit

the Commission was right in holding that it was not bound so to do in passing upon the right of the carrier to be exempt. In the case of the other and more general order, that attacked in the Atchison, Topeka and Santa Fe case, there was not, we would submit, any power to fix a reasonable rate for the future, as this order was expressly limited to passing upon applications by the carriers. In any event, this distinction between the orders does not affect the question as to the correctness of the Commerce Court's decision. That court treated the two orders as being substantially alike, and set both of them aside, holding that the Commission should have fixed reasonable rates for the short haul to all the intermountain points covered by the more general as well as to the five points covered by the more limited Spokane order.

We would submit that all that the Commission attempted to do in these orders was to lay down certain rules by which the carriers must be governed if they seek to avail themselves of the permission granted to violate the absolute prohibition of the long and short haul clause. The Commission said to the carriers: "If you wish to be exempt from the absolute prohibition imposed by Congress, you must comply with certain conditions which we as the duly authorized representatives of Congress impose." At most these orders could only be regarded as establishing general rules for the carriers to follow in making rates. These orders cannot be held to initiate rates, any more than could the action of Congress, in laying down the rules that all rates must be just and reasonable and non-discriminatory, be

held to be the initiation of rates. Congress has already said that the carriers in making rates shall not unduly discriminate against Spokane and in favor of Seattle, and these orders are of the same character but simply more definite. It is clear, we think, that neither the action of Congress nor of the Commission in establishing such rules is in any sense an initiation of rates.

But that such an order, as that suggested by the Commerce Court as the proper one for the Commission to enter upon an application filed by the carrier under the fourth section, would initiate rates, is clear. As above stated, the Commerce Court expressly declares that in granting the authority under section 4 it is the duty of the Commission to fix a reasonable short-haul rate. Under what provision of the act, we would ask, does the Commerce Court find the authority of the Commission to initiate such a rate? The only power conferred upon the Commission to determine rates for the future is found in section 15 of the act which, as above stated, contemplates an investigation of an existing rate, either upon complaint by a shipper or upon the Commission's own motion. It clearly has no reference whatever to a proceeding under Section 4 upon an application by a carrier. Prior to the Hepburn amendment of 1906, which changed section 15 so as to include this power, there was no authority in the Commission to prescribe any rates for the future. In what is known as the *Social Circle case, C., N. O. & T. P. R. Co.* v. *I. C. C.*, 162 U. S., 184, 40 L. E., 935, Mr. Justice Shiras, in delivering the opinion of the court, said at page 196:

"Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below and is discussed in the briefs of counsel.

We do not find any provision of the act that expressly or by necessary implication confers such a power.

It is argued on behalf of the Commission that the power to pass upon the reasonableness of existing rates, implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable."

In *I. C. C.* v. *C., N. O. & T. P. R. Co.*, 167 U. S., 479, Mr. Justice Brewer, in delivering the opinion of the court, said, at page 495:

"The question debated is whether it vested in the Commission the power and the duty to fix rates, and the fact that this is a debatable question and has been most strenuously and earnestly debated is very persuasive that it did not. *The grant of such a power is never to be implied.* The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that *no just rule of construction would tolerate a grant of such power by mere implication.*"

At the time of this decision Section 4 contained in its present form the first proviso relating to ap-

plications by the carriers for relief, and Mr. Justice Brewer expressly mentioned Section 4 and the duty resting upon the Commission to see that it was enforced, but still found that no power existed in the Commission to fix rates for the future. We quite agree with the contention made by the carriers in their brief filed before the Commerce Court that this case conclusively shows that Section 4 contains no grant of power for the fixing of rates by the Commission for the future. In their brief the carriers make the further statement, with which we agree:

> "While the powers of the Commission with reference to fixing rates have been greatly broadened from time to time, they have never yet been given the power to initiate rates. That power Congress has studiously withheld from them and left with the carriers. They may, either on complaint or on their own motion, investigate existing rates and reduce them or remove discrimination; they may, after the carrier has filed a tariff of proposed rates, suspend it; *but the power of initiation is with the carrier alone.* Indeed, the Commission does not claim the power to initiate rates."

In *Chicago, Rock Island & Pacific Ry. Co.* v. *I. C. C.*, 171 Fed., 680, Circuit Judge Baker, in his dissenting opinion, after referring to the changes in the law effected by the Hepburn amendment, said:

> "It is true that *the initiative in rate changing remains with the carriers and that the Commission can take jurisdiction only of those rates that are complained of, and can change such rates only after a full hearing.*"

The majority opinion by Judge Grosscup contained a statement to the same effect.

Judge Archbald of the Commerce Court, in his concurring opinion in the cases at bar said:

> "The right to inaugurate to this extent still remains with the carrier the same as before the amendment."

It therefore appears that the carriers understand, as we do, that there is no power in the Commission to initiate rates under Section 4, still we find them here attempting to sustain the decision of the Commerce Court, which holds that the Commission, "In granting authority to make an absolute long-haul rate, lower than some short-haul rate, * * * would have the power and the duty to prevent a violation of Section 1, *and by virtue of its authority to determine reasonable rates to fix the short-haul rate.*" We would submit that there is no language in the act purporting to confer any such authority on the Commission when acting upon application by the carriers under Section 4, and in the words of Mr. Justice Brewer, *supra,* "no just rule of construction would tolerate a grant of such power by implication."

VIII.

THE PROPER METHOD OF MEASURING THE EXTENT TO WHICH THE CARRIER SHOULD BE RELIEVED FROM THE OPERATION OF THE FOURTH SECTION AND THE EXTENT OF THE RELIEF TO BE GRANTED IN EACH PARTICULAR CASE, ARE MATTERS TO BE DETERMINED BY THE COMMISSION. THE COMMISSION'S FINDING AS TO THE EXTENT TO WHICH THE MORE DISTANT POINTS CAN LEGITIMATELY BE FAVORED BY THE CARRIERS IS ONE OF FACT, AND IS NOT SUBJECT TO REVIEW IN THE COURTS.

In its opinion in these cases the Commerce Court said: "Doubtless the Commission could, moreover, in order to prevent a violation of Section 3, make relative rates in so far as this might be necessary to prevent an undue preference;" and the court apparently was of the view that the Commission could have fixed such relation of rates by forbidding a difference between the coast terminal rates and the intermediate rates of more than the amount of the backhaul. While thus admitting that some relation might properly be established between these rates, the court held that the Commission could not establish a relationship by percentages irrespective of any absolute rates. For the reasons above stated, we think it was beyond the power of the Commission to fix by its order a reasonable rate for the future for the intermediate point, and it is admitted that the Commission could not in any event fix an absolute minimum rate for the terminal point below which the carriers should not be permitted to go. It would therefore appear that the Commission, when acting

under an application by a carrier under the fourth section, has no authority to fix any absolute minimum or maximum rates for either the intermediate or the more distant point, and the only method by which it can "prescribe the extent" of the difference in rates which the carriers may be permitted to establish is the one here adopted of naming certain percentages. We would submit that such method is legal and within the wide discretion vested in the Commission by the fourth section, which in no way attempts to define the procedure which should be followed by the Commission in performing its duty under the proviso. We have already discussed the general question of the discretion vested in the Commission, and we would here confine ourselves to a consideration of the duty resting upon the Commission to fix "*the extent*" of the relief.

It is clear that the purpose of Congress was to permit the carriers to depart from the long and short haul clause when the circumstances and conditions were dissimilar. The striking out by the amendment of 1910 of the express words in the first part of the section deprived the carriers of the right to act in this particular on their own initiative, but left the Commission the duty, when application was made under the proviso, of determining whether or not the circumstances were dissimilar, and of prescribing the extent to which the relief should be granted. It is contended by the carriers that this language is limited to the extent *of territory*, but we would submit that such a construction is not in accord with the plain meaning of the words employed by Congress, nor does it effect the purpose that

Congress clearly had in view. There is nothing in the fourth section itself to in any way suggest that the proviso is so limited to extent of *territory*. It would have been easy for Congress to have used proper words making its meaning clear, if it had desired to use these words in that sense. We would submit that this is a forced and fanciful construction of the language used. An examination of the debates in the House and Senate at the time the amendment of June, 1910, was pending fails to disclose any suggestion that Congress meant to limit the power of the Commission to fixing the extent of *territory* where relief would be granted, while there are repeated statements in those debates which indicate the contray view.

Senator Paynter when discussing the proposed amendment in the Senate on May 12, 1910, said:

> "I want to make an additional suggestion. The power that is given the Commission by the words:
>
> 'And the Commission may, from time to time, prescribe the extent to which such designated common carrier may be relieved from the operation of this section,'
>
> *is far more comprehensive than the words of the proviso in reference to 'special cases.'* The Commission has the power under that to absolutely suspend Section 4, for *if it can prescribe the extent to which the carrier can be relieved from the operation of the section*, then there is no limitation in its power to relieve from the operation of the section. We had a similar provision in the constitution of Kentucky and the courts have passed upon it, and the court in two cases have held that that power under the plain language of the proviso exists.
>
> That proviso has been in this section since the

> creation of the Interstate Commerce Commission, and the Commission has passed upon many cases when the proviso was under consideration. The Supreme Court has been doing the same thing, and there has been no condemnation, so far as I am aware, of that last clause of the proviso to which I refer, to wit, 'Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section,' *which in plain terms in effect confers upon the Commission the power to suspend the operation of Section* 4." (45 Congressional Record, p. 6124.)

Congress clearly intended to confer upon the Commission the power to limit in some appropriate manner the amount by which the rate to the more distant point might legitimately be made less than that to the intermediate point. Congress evidently recognized the fact that, even though dissimilar circumstances and conditions might exist, the mere presence of such conditions would not in many cases adequately account for the extent of the preference given by the carriers to the more distant point. Congress recognized that the more distant point was entitled to the advantage of a lower rate, so far and *only so far* as such rate was forced upon the carrier by conditions beyond its control. It was not, merely because of the presence of water competition, entitled to have a rate established by the carriers below that forced by this competition, and it was with the idea of meeting this situation and measuring with some degree of exactness the "extent" to which the rate at the more distant point could be legitimately lower than at the intermediate point that

Congress used what to us seems the appropriate language of the proviso.

As was stated by Commissioner Lane in his opinion, 21 I. C. C. R., at 341:

> "That the intendment of the law is to make its prohibition of the higher rate for the shorter haul a rule of wellnigh universal application from which *this Commission may deviate only in special cases, and then to meet transportation circumstances which are beyond the carriers' control;* that is to say, a carrier shall not prefer the more distant point by giving it the lower rate because of any policy of its own initiation, but if at the more distant point it finds a condition to which it must conform under the imperious law of competition if it would participate in traffic to that point, it may discriminate against the intermediate point without violating the law, provided it establishes such necessity before the Commission. *But to this discrimination there may be a limit set by the Commission.* The discrimination may not be such as to offend the reasonable standards of the law, for it is said that the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

Commissioner Prouty in his opinion in referring to the amendment of June, 1910, said at page 410:

> "It was the manifest intent of Congress not only to provide by the amendment of this section that carriers must become the advancing party in justifying this particular species of discrimination, but also to give to the Commission some effective power to deal with the case when presented. Had the only purpose of Congress been to shift the burden of proof it would have said so, as it did with respect to certain other rate conditions. If the only function of

the Commission is to inquire whether competition exists at the more distant point, the matter stands, for all practical purposes, exactly where it has stood from the first. *Congress certainly meant to go further than this. It meant not merely to declare a wrong, but to provide a remedy.*"

He had previously pointed out, on page 409, that:

"*To hold that carriers may, wherever the dissimilarity exists, meet that competition or decline to meet it, partially meet it here and fully meet it there, is to hold that they may, without practical restraint, discriminate between different localities.*"

If the power of the Commission were limited to merely the granting or denial of the carrier's application, it is evident that the fourth section would not accomplish its purpose, for in cases where there were such dissimilar conditions as water competition at the more distant point, the Commission would have to grant the exemption from the section, which, under the construction sought to be placed upon the proviso by the carriers, would be without limitation or condition as to the amount of the rates to be charged, thus leaving the carriers free to arbitrarily establish an unnecessarily low rate to the more distant competitive point.

That the Commission, in the orders here complained of, attempted to gauge as accurately as possible the extent to which the rates at the Pacific coast terminals are forced by water competition, is clear from the opinions of Commissioners Lane and Prouty in these cases.

After discussing in general the vexed question as

to how far water and other competition control rates to the Pacific coast terminals, Commissioner Prouty took up in detail the several zones into which the Commission had divided the country for the purposes of these orders. He said:

"Looking at this whole situation and endeavoring to justly consider the interests of all parties affected, including the carriers, we are of the opinion that from zone 1 no higher charge can justly be made at any intermediate point than to a more distant point. The eastern limit of this territory is approximately 1,500 miles from the Atlantic seaboard, almost midway between the Pacific and Atlantic oceans. *No traffic has ever been, and none probably ever will be, transported from this section to the Atlantic coast and thence by water to the Pacific coast. Giving full weight to the effect of competition of all kinds, we can find no justification for a system of rates which maintains from this territory a higher charge to any interior point than is made to the coast.*

With respect to territory embraced in zone 2 the case stands somewhat different. This zone comprises the Mississippi Valley and a considerable portion of the great manufacturing area of the west. It lies 400 miles nearer the Atlantic seaboard, with which it is connected in part at least by lines of railroad affording the cheapest transportation service in any part of the country. *Still there never has been and there probably never will be in the future any considerable movement of traffic from this territory to the Pacific coast by way of the Atlantic seaboard.*

We are of the opinion that rates from this territory to intermediate points may properly exceed by not more than 7 per cent. rates from the same points of origin to Pacific coast terminals.

From zone 3 there is still greater possibility

of actual transportation competition on business destined to Pacific coast points, although from this section hitherto the actual movement has been only occasional.

We are of the opinion that from points of origin in this territory rates to intermediate points may properly exceed those to terminal points by not more than 15 per cent.

In the past the actual movement from eastern points of origin to Pacific coast terminals has been mainly confined to zone 4, and even in this zone the greater part of the traffic has originated in or near the seaboard itself.

The force of water competition is greatest at New York and gradually diminishes as the distances from New York increases, but we are of the opinion that this entire territory may properly be treated as a single group, and that rates from points of origin within its limits to intermediate points may properly exceed those to terminal points by not more than 25 per cent." (21 I. C. C. Rep., 425-426.)

In the 25th annual report the Commission, in referring to these cases, said at page 31:

"The section also authorizes the Commission to prescribe the extent to which the carrier may be relieved from the rule of the section. We understand this to mean that if the Commission reaches the conclusion that some higher charge might properly be imposed at the intermediate point, but that the present discrimination is too great, then it may fix the extent to which the rate a the short distance point may exceed that at the long distance point.

* * * * *

If we find that those competitive conditions do exist, but do not justify a discrimination of the degree now in force, then it is our duty to prescribe the extent to which the discrimination may go, if at all.

* * * * *

> If there were no water competition at San Francisco it would be a discrimination against Reno to make as low a rate to the more distant point as *to it, and to just the extent that the rail line gives to San Francisco a rate below that to which its natural advantage entitles it, to that extent it discriminates against the intermediate point.* Now, who is to say whether the rate made to San Francisco is or is not properly induced by water competition at that point? Who shall determine whether the transcontinental rail line is, upon the pretext of water competition, giving to the terminal point a rate below what its natural position would entitle it, and thereby discriminating against the intermediate City of Reno? * * *
>
> "*The Commission is of the opinion that Congress has endeavored to invest this body with authority to inquire whether the action of the railway in meeting this water competiton is justifiable.*"

As appears from the reports of the Commission in these two cases, a great amount of testimony was introduced before the Commission on this question as to the force of the water competition. It has for many years been one of the vexed questions upon which there has been a great divergence of view between the shippers and the carriers, and its correct solution has troubled the Commission; but however difficult of solution it may be, the act makes it the duty of the Commission to decide this question, and it is to be noted that Section 4 uses the phrase: "A *determination* of such application by the Commission," indicating, as we have already urged, the finality of its decision.

But waiving for the present the argument above advanced in favor of the finality in all respects of

a ruling of the Commission made upon the application of a carrier for relief under the fourth section, it must surely be conceded that such ruling, so far as it is based upon conclusions of fact is binding on the courts. *I. C. Commission* v. *I. C. R. R. Co.*, 215 U. S., 452; *Baltimore & Ohio R. Co.* v. *Pitcairn Coal Co.*, 215 U. S., 481; *I. C. Commission* v. *Chicago, R. I. & P. Ry. Co.*, 218 U. S., 88; *I. C. Commission* v. *Delaware & Lackawana R. Co.*, 220 U. S., 235; *I. C. Commission* v. *Union Pacific R. R. Co. et al.*, opinion filed in this court Jan. 9, 1912.

In the Pitcairn case Mr. Chief Justice White, in delivering the opinion of the court, said:

> "In considering section 15 in the case of *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, just decided, *ante*, p. 452, it was pointed out that the effect of the section was to cause it to come to pass that *courts, in determining whether an order of the Commission should be suspended or enjoined, were without power to invade the administrative functions vested in the Commission and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency.*"

In this *Pitcairn* case it was held that questions as to the proper distribution of coal cars were within the competency of the Commission and should not be examined into by the courts, at any rate until after the Commission had acted. So strongly did the considerations in support of the exclusive jurisdiction of the Commission appeal to this court that it held the provisions of Section 23, concerning the issuing of the writ of mandamus, which on their face seemed to give the shippers the right, in such

cases as were there presented, to apply to the courts for relief in the first instance, did not in fact afford such a remedy.

In the *Rock Island Railway case, supra* (known as the Burnham-Hanna-Munger case), Mr. Justice McKenna, in delivering the opinion of the court, said at page 108:

> "As we have said, the Commission is the tribunal that is intrusted with the execution of the interstate commerce laws and has been given very comprehensive powers in the investigation of and determination of the proportion which the rates charged shall bear to the service rendered, and this power exists, whether the system of rates be old or new. * * * One question remains for discussion, the finding of the Commission upon the character of the rate, whether it is unreasonable as decided. *Such decision, we have said with tiresome repetition, is peculiarly the province of the Commission to make, and that its findings are fortified by presumptions of truth, 'due to the judgments of a tribunal appointed by law and informed by experience.'*"

In the *Delaware-Lackawanna* case, *supra*, Mr. Chief Justice White, in delivering the opinion of the court, said at page 251:

> "We say the contentions all reduce themselves to this, because in their final analysis all the other differences, insofar as they do not rest upon the legal proposition just stated, are based upon *conclusions of fact as to which the judgment of the Commission is not susceptible of review by the courts. Baltimore & Ohio R. R. v. Pitcairn*, 215 U. S., 481. This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adop-

tion of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except insofar as they rested upon the legal proposition we have just stated, proceeded upon *premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so considered by the court because they were foreclosed by the opinion of the Commission.* * * * But in the absence of any statutory authority to exclude the forwarding agent, and basing the right to exclude merely upon the assumption that the nature and character of his business would produce discrimination, and therefore justify the exclusion, the contention is not open for our consideration, because, like the previous one, it is foreclosed by the finding of fact of the Commission. * * *

It is said that as the business of the forwarding agent is in a sense competitive with that of a carrier and may largely diminish the revenue derived by railroad companies from their less than carload rates, and hence cripple their ability to successfully conduct business, therefore the right to exclude the forwarding agent, even if there is no power to exclude the owner or the ordinary agent of owners, should be permitted. *This, however, again, in a twofold sense, is directly in conflict with the findings of fact made by the Commission; first, because it disregards the findings as to the operation of the business of a forwarding agent, and, second, because it overlooks the express finding of the Commission that it would be so difficult, if not impossible, for the carrier to determine in practice the nature and character of the title of a person tendering goods for shipment that the necessary result of a rule excluding a forwarding agent would be to embarrass shipments by owners or their special agents,*

and thus beget universal uncertainty and constant discrimination and preference against owners."

In *Interstate Commerce Commission, Appellant*, v. *Union Pacific Railroad Co. et al.*, decided by this court January 9, 1912, Mr. Justice Lamar, in delivering the opinion of the court, said:

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Int. Com. Com.* v. *Ill. Cent.*, 215 U. S., 470; *Southern Pacific* v. *Int. Com. Com.*, 219 U. S., 433; *Int. Com. Com.* v. *Northern Pacific*, 216 U. S., 544; *Int. Com. Com.* v. *Alabama Midland*, 168 U. S., 146, 174.

In determining these mixed questions of law and fact, *the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling.* 'The findings of the Commission are

made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.*, 206 U. S., 441. *Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.*"

We would respectfully submit that in the opinion of the Commerce Court, it appears that in the cases now before this court, the Commerce Court took into consideration questions of expediency and must have assumed facts which were in conflict with the findings of the Commission. In closing its opinion the Commerce Court said, at page 18:

"In a word, unless some through business is given up, the effect of the orders would be to put Spokane and other interior points on an equality with Seattle and other Pacific coast points, at least from zone 1, *a position to which they would not be entitled under all circumstances in view of their relative locations, the former 400 miles, more or less, in the interior, the later on the coast.*"

On what theory, we would ask, did the Commerce Court decide that Spokane, which is 400 miles nearer than Seattle to St. Paul, is not entitled to as low a rate as that enjoyed at Seattle, because of the mere fact that the latter is located upon the coast? It is apparent that the Commerce Court must have based its conclusion upon the assumption that the existing rates from St. Paul to Seattle were and properly should be affected by water competition.

This is directly in conflict with the findings made by the Commission after an exhaustive examination of the facts involved. Referring again to the language above quoted from Commissioner Prouty's opinion, we find that the Commission distinctly holds that water competition does not affect the St. Paul-Seattle rates. Speaking of zone 1, he said, at p. 425:

> "The eastern limit of this territory is approximately 1500 miles from the Atlantic seaboard, almost midway between the Pacific and Atlantic Oceans. *No traffic has ever been, and none probably ever will be, transported from this section to the Atlantic coast and thence by water to the Pacific coast.* Giving full weight to the effect of competition of all kinds, we can find no justification for a system of rates which maintains from this territory a higher charge to any interior point than is made to the coast."

Again, we think that the following statement in the opinion of the Commerce Court, at page 9:

> "*The Commission found specifically* that the Pacific Coast rates from part of this eastern territory were forced by water competition, and that the rates from other parts were forced by market competition; for example, that the railroads based the New York-Seattle rate on the ocean competition and that they granted the same rate from St. Paul to Seattle in order to enable St. Paul to compete with New York in the Seattle market" (Rec. No. 883, p. 343),

is hardly justified by the opinion written by Commissioner Prouty, and is in conflict with that written by Commissioner Lane, the latter being clearly of the opinion that neither water competition nor any legitimate "market competition" from the Atlantic seaboard had any appreciable in-

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fluence on the making of rates from St. Paul to Seattle.

Commissioner Lane, in his opinion, said at page 354 (21 I. C. C. Rep.):

> "We have noticed how through the years this blanket of class and commodity rates has been drawn *westward* from the sea-competitive point until it extends two-thirds of the distance across the continent. How have the carriers justified this blanket in the coast but not to intermediate points? Long before the blanket had been stretched to its present western extent the communities intermediate between its eastern border and the Pacific made protest against the injustice that was being done. *For nearly a quarter of a century this complaint has been heard and has ceased at times only to be revived with greater earnestness. A line of railroad policy which leads to such result may be presumed to have in it something artificial and unnatural. That which appeals to us as unnatural in this situation is that rates which are said to be less than reasonable because compelled by ocean competition are made from points where we can find no such competition.* It does Reno no injustice for the transcontinental lines to give San Francisco a rate from New York that will enable them to carry traffic as against the ocean carriers out of New York. By such policy Reno secures the advantage of her proximity to San Francisco, an ocean terminus. If the ships out of New York find it profitable to pay the railroad rate from Pittsburg to New York in order to take the freight from the transcontinental lines, a rail rate which will meet this competition at Pittsburgh is permissible. It is fairly established that the influence of water competition does not cease at the Pittsburgh-Buffalo line, but extends westward as to certain particular commodities, and doubtless for some dis-

tance west of Pittsburgh the carriers may properly make rates which will prevent the movement eastward to the seaboard instead of westward over their lines, *but we look in vain throughout the records of this Commission for 20 years to find any but the most fragmentary evidence that sea competition extends to Chicago.* On the contrary, it is the admission of the carriers themselves that the rates which they make from Chicago to the Pacific Coast terminals are established in order that the manufacturers and the jobbers of the west may compete on a level with the jobbers and manufacturers who have the advantage of a location at the Atlantic seaboard."

He said at page 365:

"*The condition is too artificial to last.* The carriers have taken from San Francisco in large part the advantage that she should enjoy from her situation upon the ocean by throwing around her a circle of terminal *points* 100 *miles or so inland.* By doing this they have forced water carriers to meet rail competition at these interior places, and *yet the railroads urge that the rates are made to meet ocean-to-ocean competition.* In the east they have stretched the blanket from Portland, Me., to Denver, Colo., a distance farther than from Antwerp to Moscow, but they refuse to admit that from any point along this long line it would be justifiable to make the rates given to the coast terminals applicable to Reno.

Furthermore, we *find that this situation is artificial in that it has been brought about by a procession of agreements between carriers.* Each carrier has been appeased by giving to it something which would cause it to be satisfied with the arrangement."

He said at page 367:

"'Market competition' is a phrase with which

the railroad traffic manager too often conjures. *When no other force can be found which brings about a discrimination, market competition is advanced.* It is both a sword and a shield; it is used to protect the carrier against attack because of undue discrimination as between communities, and it is a weapon of offense as well, by which one carrier invades the territory of another upon a different basis from that which it grants to its own immediately dependent communities and forces concessions from its rival carriers.

Market competition, as we have seen, is a *euphemism for railroad policy.*"

Commissioner Prouty in his opinion said, at page 414:

"*Strictly speaking, there is no such thing as market competition which is distinct from competition between the lines of transportation serving the market.* A market can only compete through the agency which transports for it. The carrier makes a rate from a given market, not out of favor to that locality, but because it desires to obtain traffic which will not otherwise come to it. There would seem, therefore, to be little distinction between the competition of markets and the competition of rival railroads. The whole situation must be considered by us in passing upon these applications."

It is true there are statements in the opinion of Commissioner Prouty indicating as contended by the carriers that water competition controls, and in a sense dictates the rate, even from an interior point, such as Chicago, to the Pacific Coast terminals; but in view of the express declaration by Commissioner Prouty above quoted to the effect that "No traffic ever has been and probably ever will be transported from zone 1 to the Atlantic Coast, and thence

by water to the Pacific Coast," we are justified, we think, in concluding that, in any event, so far as zone 1 is concerned, Commissioner Prouty agrees with the views emphatically expressed by Commissioner Lane that "neither water nor market" competition controls the rates from St. Paul to Seattle. Apparently both of the Commissioners felt that so far as St. Paul rates were concerned, the changing of materially lower rates for the haul to Seattle than for the haul to Spokane, which is 400 miles nearer, is dictated by selfish considerations of railroad policy.

Commissioner Prouty expressly condemns this method of rate making in the following language at pages 423 and 424 of his opinion:

> "It is a manifest economic waste to haul traffic over the Cascade mountains and back again. The interest of the carrier and of the public as much require that this business should stop at Spokane instead of going on to Seattle as that it should originate in the middle west instead of upon the Atlantic seaboard."

We would, therefore, submit that the above paragraph quoted from the opinion of the Commerce Court concerning the St. Paul rates, is not in accord with the findings of the Commission, and that those findings are supported by "substantial evidence" heard by the Commission as appears from its aforesaid reports. As stated by Mr. Justice Lamar *supra*, under these circumstances the Commission's findings are "accepted as final" by the courts.

That the Commerce Court was influenced by considerations of expediency appears further from the following passage, at page 17, in its opinion:

"The practical effect of the Commission's order is either to compel a blanket rate from the entire east to the entire west, or to prevent the carriers from getting all the business which they now secure without loss by making rates which enable merchants to meet market competition. For example, if the forced New York Seattle rate is $1, the St. Paul-Seattle rate cannot be made higher by the St. Paul carrier, unless it gives up the benefit of business which market competition at Seattle might bring to it. As long as it charges no one else an unreasonable rate, and so long as it does not carry under cost, it is entitled to grant St. Paul the market competitive rate of $1. Under the order, its rate to Spokane in that event could not exceed $1, while the New York carrier could charge $1.25. The latter, however, would also have the right to enable New York to meet St. Paul competition in Spokane. To do this it would have to reduce the New York-Spokane rate to $1. *The result would be either to compel a blanket rate from all points east of St. Paul to all competitive points west of St. Paul or to force the carriers to give up some business which could be carried without loss to themselves or damage to any one else. The Commission's order, moreover, does not even secure to Spokane the market competition of St. Paul and New York*, since it empowers the railroads to charge a higher rate from New York, which might exclude New York from the Spokane market." (Rec. 883, p. 346.)

We would submit that under the decisions of this court above cited the Commerce Court cannot set aside the orders of the Commission "on a mere exercise of judgment as to its wisdom or expediency." If the Commission had the power, as a matter of law, to establish relative rates—and this the Com-

merce Court admits or is willing to assume—that court cannot, we submit, annul or set aside these orders merely because the relation of rates established by the Commission is not in accord with what the Commerce Court thinks would have been desirable from the standpoint either of the carriers or of the communities which they serve.

IX.

THE ORDERS OF THE COMMISSION ARE NOT INVALID BECAUSE OF THEIR WIDE SCOPE OR BECAUSE THEY ESTABLISH ZONES IN ACCORDANCE WITH THE USUAL PRACTICE OF THE CARRIERS.

As we understand it, Judge Mack of the Commerce Court did not in his opinion specifically base his condemnation of these orders on either of the above grounds. He states at page 5 of his opinion that the orders "provide that for the purposes of the disposition of the applications, the United States should be divided into five zones (being the same as those specified in a Transcontinental Tariff on file)" (Rec. 883, p. 340), but does not—at least expressly—condemn the zone method of making rates by the carriers or the adoption of a similar method by the Commission in passing on the applications of the carriers. Judge Archbald, at page 25 of his opinion, said:

> "By no device can the whole United States be made a 'special case'; nor can the Commission, upon any just conception of its powers, lay down a hard and fast rule which shall apply to every long and short haul case wherever originating

> or whatever its destination from east to west across the country. Nor is this saved by the establishment of zones with varying percentages." (Rec. 883, p. 350.)

We would call attention to the fact that the phrase "special cases," to which Judge Archbald refers, occurs only in the first proviso of Section 4, which has been a part of that section from its original enactment, while the clause forming the second proviso, authorizing the continuance in force of "lawfully existing" rates under which the applications here in question were filed, was incorporated in the fourth section by the amendment of June, 1910; and it would seem that under this amendment, if not before, applications to the Commission for relief under Section 4 need not be confined in any strict sense to "special cases," but might be more general in their scope. If the true construction of the section in its present form requires that the application of the carriers for relief under this section should be confined to naming a few definite points along one line of railway, it would be necessary for the carriers to file hundreds of thousands of applications before the Commission in order to cover the rates which were included in the five thousand applications filed within the first six months after the passage of the amendment. This second proviso reads as follows:

> "That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in ac-

cordance with the provisions of this section, until a determination of such application by the Commission."

The rates referred to as "lawfully existing" must have been on file with the Interstate Commerce Commission and, as Congress well knew, it is the universal custom of the carriers to file their rates in schedules covering a large number of individual rates and an extensive territory. We believe that Congress under this second proviso intended to allow these *schedules* of rates so on file to be continued in effect until the Commission had passed upon them as *schedules*. The carriers evidently so understood this amendment, for without any requirement in this regard from the Commission, the carriers filed, as part of these applications, their tariffs covering thousands of rates from all points on these transcontinental lines. As is said at the beginning of the Fourth Section Order here attacked, "These applications as above numbered, on behalf of the Transcontinental Freight Bureau, ask for authority to continue rates from eastern points of shipment which are higher to intermediate points in Canada and in the States of Arizona, New Mexico, Idaho, California, Montana, Nevada, Oregon, Utah and Washington and other states east thereof, than to Pacific coast terminals." In these applications the carriers "respectfully petition the Interstate Commerce Commission for authority to continue *all rates shown in the above named tariffs* from eastern shipping points designated to the Pacific coast terminal points and other points designated," etc. Not only do these tariffs cover the entire country, but in their making

the carriers had adopted a group or zone system substantially like that followed by the Commission. We do not understand that the carriers in any way attack these present orders because of the zones therein established. In fact, the carriers contend, as above pointed out, that by the express language of the proviso the Commission is authorized to prescribe "the extent" *of territory* where relief shall be granted to petitioning carriers. It would seem hardly open for them to criticise the Commission on either of the points now under discussion, when the Commission had only followed the long settled practice of the carriers and had complied—so far as these particulars are concerned—with the express request of the carriers contained in these applications. In *Chicago, Rock Island & Pacific Railway Co.* v. *Interstate Commerce Commission,* 171 Fed., 680, Circuit Judge Baker, in his dissenting opinion, said at page 692:

> "But, if any serious meaning is to be attributed to the rate-making provision in the Hepburn Act, there should be no doubt that Congress did not intend to deny to the Commission the right to use the very system which the railroads have developed and established in this country."

On appeal to this court in *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway Co.,* 218 U. S., 88, the decision of the Circuit Court of Appeals was reversed, although it was held that if the order of the Commission there in question was intended to create artificially "zones tributary to certain trade centers" and to "overturn the equality of opportunity in competition which cer-

tain commercial centers possessed" under the present system of the carriers, the order would have been void; but Mr. Justice McKenna delivered the opinion of the court and held that the purpose of the Commission evidently was not as urged by the carriers, and that the orders were valid. We would submit, therefore, that this case is an authority in favor of the power of the Commission, when acting upon proper considerations, to establish zones for the purpose of carrying out its legitimate orders.

By the very nature of the duties devolving upon it, it has been found necessary for the Commission in very many cases to enter orders of wide scope. For instance, the amendment of June, 1910, incorporated in Section 15 of the act authority to suspend "any schedule" filed by the carriers stating any new rate, charge, classification, regulation or practice, pending a hearing for a period of not to exceed six months, and after full hearing, indefinitely. *In re Investigation of Advances in Rates by Carriers in Western Trunk Line, Trans-Missouri, and Illinois Freight Committee Territories*, 20 I. C. C. R., 307, arose under this new power of suspension. Commissioner Lane, in making a report of the Commission, said at page 309:

> "This proceeding, which is popularly known as the 'Western Advanced Rate Case,' involves the reasonableness of the rates upon some 200 commodities which the carriers west of Chicago have attempted to increase. *No effort can be made to specify the individual rates, inasmuch as these number several hundred thousand, nor can the territory involved be precisely delimited,*

although a fair idea of its extent may be had by a survey of a map of the Burlington system which leads to most of the basing points upon which the rates concerned are fixed. *More than 200 railroads operating in the States of Wisconsin, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas and Montana are parties to these rates. It is needless to say that neither the carriers nor the shippers have throughout this investigation attempted to deal with all the specific rates between definite points of movement upon these lines of road. This investigation has been a general one, touching large and fundamental principles of law and governmental policy on the one hand, and of railroad needs, plans and policies on the other.*

The rates concerned are under voluntary suspension by act of the carriers. It will be recalled that in June, 1910, the principal carriers in Western Trunk Line territory filed with the Commission tariffs increasing their rates upon a number of important articles of commerce. This action was taken through common agents. Before such rates, however, had gone into effect the Attorney General of the United States caused suit to be brought in the Circuit Court of the United States for the Seventh Circuit, alleging that such increased rates were the result of a combination and conspiracy in restraint of trade and in violation of the Sherman anti-trust act. A temporary injunction having been secured, appeal was made by the carriers affected to the President of the United States, asking relief from such injunction and offering to voluntarily suspend the effectiveness of such rates pending a determination as to their reasonableness by the Interstate Commerce Commission. This appeal was made in view of a bill then pending before Congress amending the act to regulate commerce so as to vest in this Commission the power to suspend advanced rates.

> Such bill later became law. The carriers thereupon refiled their tariffs, suspending their effectiveness, however, until such time as the Commission could conduct the present investigation."

A similar investigation was conducted at the same time by the Commission as to a proposed advance in eastern territory, and the scope of this investigation appears by the report of Commissioner Prouty in 20 I. C. C. R., 245, where he says:

> "The Official Classification applies in territory which is bounded, roughly speaking, by Canada upon the north, the Atlantic Ocean upon the east, the Ohio and Potomac rivers upon the south, and the Mississippi River upon the west. *About one-fourth of the total single-track railroad mileage of the United States is embraced within this territory, but owing to greater density of traffic nearly one-half the total gross operating income accrues within these limits.* This proceeding concerns a general advance in freight rates in Official Classification territory."

In neither of these cases was it necessary for the Commission to make a specific order. The carriers were required to cancel by a certain date "their advance tariffs on file and restore their former rates," and the carriers complied with this direction of the Commission. But even prior to the vesting in the Commission of this power to suspend rates we find the Commission repeatedly engaged in a general investigation of transportation matters. For instance, in a single volume (Vol. 12) of the Commission's reports we find all of the following investigations:

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In the Matter of Allowances to Elevators by the Union Pacific Railroad Company. 85

In the Matter of Car Shortage and Other Insufficient Transportation Facilities.... 561

In the Matter of Consolidations and Combinations of Carriers, Relations between such carriers, and Commmunity Interests therein, Their Rates, Facilities, and Practices 277

In the Matter of Free Transportation of Newspaper Employees on Special Newspaper Trains 15

In the Matter of Issuance of Passes to Bondsmen by the Missouri, Kansas & Texas Railway Company (1185)..... 588

In the Matter of Party Rate Tickets..... 95

In the Matter of Railroad-Telegraph Contracts 10

In the Matter of the Right of Railroad Companies to Exchange Free Transportation with Local Transfer and Baggage Express Companies 39

In the Matter of Through Routes and Through Rates 163

In the Matter of the Transportation of Land and Immigration Agents..... 7

In some of these cases, as appears by the reports thereon, specific orders were made by the Commmission, while in other cases it was sufficient, apparently, for the Commission to state its recommendations without entering a formal order.

We would again call attention to the fact that by the terms of the proviso of Section 4 the Commission is required to make an "investigation," as distinguished from giving the parties "a full hearing," as provided in Section 15. A less formal and less technical proceeding is, we think, authorized under

Section 4 and an "investigation" thereunder may well have a wide scope such as was given to the investigations in the cases above cited. In such investigation the Commission would not be required,—or in fact be able—to deal with "all the specific rates between definite points of movement" any more than it was in the Advance of Rates case, *supra*, in which Commissioner Lane wrote the report.

In the very nature of the case, it seems to us that Congress must have intended to confer upon the Commmission authority to make general orders under different sections of the act, for otherwise the very purpose of the act would be defeated. We would submit, moreover, that the power of the Commission to enter general orders under Section 15 has already been recognized in at least one decision by this court. In *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Railway Co.*, 167 U. S., 479, Mr. Justice Brewer in delivering the opinion of the court, at page 509 said:

> "*There is nothing in the act requiring the Commission to proceed singly against each railroad company for each supposed or alleged violation of the act.* In this very case the order of the Commission was directed against a score or more of companies and determined the maximum rates on half a dozen classes of freight from Cincinnati and Chicago respectively to several named southern points and the territory contiguous thereto, *so that if the power exists, as is claimed, there would be no escape from the conclusion that it would be within the discretion of the Commission of its own motion to suggest that the interstate rates on all the roads of the country were unjust and unreasonable, notify the several roads of such opinion, direct*

a hearing, and upon such hearing make one general order, reaching to every road and covering every rate.''

In this case, to be sure, it was held that the power claimed by the Commission to fix rates for the future did not exist at all, but Mr. Justice Brewer expressly stated "that if the power exists, * * * there would be no escape from the conclusion that it would be within the discretion of the Commission * * * to make one general order, reaching to every road and covering every rate." As we understand it, he does not in any way criticise the generality of the orders then before the court, but rather, affirms that they would be legal if the power to fix rates had been vested in the Commission. There certainly can be no question, in view of this opinion, that the Commission when acting under Section 15 is not required to proceed "singly against each railroad company for each supposed or alleged violation of the act."

As to Section 4 in particular, we have as yet only the practice of the Commission as a guide and can not refer to any express adjudications by the courts. This is naturally so because prior to the amendment of June, 1910, the proviso was, as above pointed out, practically a nullity, and therefore the scope of its terms did not call for judicial determination. In Kentucky—the only state, we think, which has a proviso like that contained in Section 4—the railroad commission found it necessary, as appears from the above quotation from the Congressional Record, to enter an order of the most general scope and which, according to Senator Lodge, practically suspended

the operation of the section for all carriers. We have been unable to find that such action of the Kentucky commission has been passed upon by the courts.

X.

IN CONCLUSION, WE FIND OURSELVES AGREEING WITH MANY OF THE LEGAL PROPOSITIONS ADVANCED BY THE CARRIERS BUT DISAGREEING WITH THEM AS TO THE APPLICATION OF SOME OF THESE PROPOSITIONS TO THE FACTS IN THE CASES AT BAR.

As to the constitutional question, we agree that if the fourth section vested an uncontrolled and arbitrary power in the Commission, the section would be unconstitutional, but we find no such power there granted. We agree that sections 1 and 3 of the act should not be construed as establishing exclusive standards for the guidance of the Commission in the exercise of its discretion under the proviso in Section 4, but we do not agree that this renders the section unconstitutional.

As to the construction of the section, we agree that the Commission in acting thereunder has no power to initiate rates, but we do not admit that the orders here in question in any way attempt to initiate rates. On the other hand, we do contend that such orders as the Commerce Court holds would have been proper for the Commission to have entered would have initiated rates in fixing a reasonable rate for the shorter haul. We agree that the Commission, in passing on an application of the carrier under Section 4, is not required to pass on specific rates, but

may reserve for further proceedings upon complaint or in an investigation instituted on the motion of the Commission, the questions as to whether the specific rates involved violate the other sections of the act. We agree that the Commission can establish zones, but we differ from the carriers as to the power of the Commission to make an order of as general scope as those here involved. It would seem that the principal difference between the carriers and ourselves (aside from their conclusion that amended Section 4 is unconstitutional) arises from the construction of the express language of the proviso authorizing the Commission to "prescribe the extent" to which relief should be granted to the carrier. These words clearly cannot be ignored. The carriers contend that the power thus expressly given to the Commission has to do only with fixing the extent *of territory*, while we contend that it includes the power to fix the extent to which rates to the intermediate points may legitimately exceed the rates to the more distant points because of special competitive conditions there existing.

The questions on which we differ from the Commerce Court are indicated in the specification of errors above set forth, and on the errors there assigned we would submit that the decision of that court should be reversed.

Respectfully submitted,

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196 v 162

Supreme Court, U. S.
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Supreme Court of the United States.

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~~196 v 574~~

Nos. ~~883 and 928.~~

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellants*,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., *Appellees.*

APPEALS FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE DENVER & RIO GRANDE RAILROAD COMPANY AND WESTERN PACIFIC RAILWAY COMPANY, APPELLEES.

F. W. M. CUTCHEON,
JAMES C. JEFFERY,
KERNER EASTON,
For Appellees Above Named.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

Nos. 883 and 928.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellants*,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., *Appellees.*

APPEALS FROM THE UNITED STATES COMMERCE COURT.

Brief for The Denver & Rio Grande Railroad Company and Western Pacific Railway Company, Appellees.

STATEMENT.

A sufficient statement of the facts that are of common concern to all the carriers, appellees in this case, will be found prefixed to the brief filed upon behalf of the Atchison, Topeka & Santa Fe Railway Company, the Union Pacific Railroad

Company, and other appellees. There are, however, certain considerations of fact not referred to in that statement which bear particularly upon the situation of the Western Pacific Railway Company. These, which cannot be stated formally and sequentially without enormous repetition of connecting matter, are briefly brought out at appropriate points in our argument, which is directed altogether to three matters:

1. The question of the constitutionality of Section 4 of the Act to Regulate Commerce as now amended (pp. 3 to 49);

2. The action of the Interstate Commerce Commission in denying any relief as to the traffic originating in Zone One, as defined by the Commission (pp. 50 to 75); and

3. The power of the Commerce Court to enter a final decree in the form adopted by it (pp. 76 to 79).

We particularly desire to have it understood that we are in complete accord with the views expressed in the very able brief of our associates. We are thus presenting our individual views upon certain points that seem to us of special importance only because an inability to confer with our associates while their brief was in course of preparation has prevented our suggesting the incorporation of these views in that brief.

BRIEF AND ARGUMENT.

SECTION 4 OF THE ACT TO REGULATE COMMERCE AS AMENDED JUNE 18, 1910, IF CONSTRUED TO CONFER UPON THE INTERSTATE COMMERCE COMMISSION ARBITRARY DISCRETION TO GRANT RELIEF FROM THE STRICT RULE OF THE SECTION, IS UNCONSTITUTIONAL.

Section 4 of the Act to Regulate Commerce, as amended in 1910, so far as it is material here, provides:

> "That it shall be unlawful for any common carrier * * * to charge or receive any greater compensation * * * for the transportation of passengers or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, * * * *provided, however,* That upon application * * * such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances * * * and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided, further,* That no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expira-

> tion of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission in accordance with the provisions of this section until a determination of such application by the Commission * * *."

At the time of the passage of the amendatory act all of the carriers who were petitioners below had in force numerous rates governing the transportation of commodities to Pacific Coast terminal points that were lower than the rates charged for the transportation of the same commodities to nearer points upon the same lines. It is conceded, both in Chairman Prouty's report in the "Spokane Case" and in Commissioner Lane's report in the "Fourth Section Case," that a dissimilarity of "circumstances and conditions" existed, as between the terminal points and the intermediate points in question, and that, assuming that the traffic in question was to be carried to the terminal points at all, the making of rates to those points lower than the rates charged to the intermediate points, was compelled directly or indirectly by the existence of water competition. This rate situation had existed for many years prior to the passage of the Amendatory Act of 1910; the railway companies concerned had built up great businesses in reliance upon it; great centers of population had grown up upon the Pacific Coast, dependent upon the continuance of the situation, in a large measure, for the volume of their business and the

facility with which it was conducted; and the railway companies, appellees in this cause, had invested great sums of money in terminals, equipment and other facilities designed to handle the business to which the rates in question applied. As appears by the uncontroverted allegations of the petition of the appellees (and there are no findings of the Commission that conflict with these statements), the Commission's "Fourth Section Order" (forbidding the charging of higher rates for the short haul than for the longer haul from points in "Zone 1," so-called, and fixing differentials applicable to traffic originating in the other zones), if enforced, will have the effect either of compelling the carriers to charge rates less than reasonable to the intermediate points or of compelling them to abandon a large portion of the business to Pacific Coast points upon which a large part of the value of their properties depends; and, of course, even more true would it be that an entire inability to charge more for the shorter than for the longer haul would result in disaster to the business of the carriers and impair the value of their properties. Consequently, the carriers, after the passage of the Amendatory Act, were in practical effect compelled to apply to the Commission, within the six months' period of grace provided for in the act, for relief from the strict rule of Section 4 as amended. In consequence of these applications, the prohibition of the section did not become operative upon the rates covered by the applications un-

til the determination of the applications by the Commission; and could become operative then only in event that the applications should be denied or, if granted in part, to the extent to which they should lawfully be denied.

Now, it is contended by some of the parties to this suit that the Commission, in passing upon applications for leave to maintain existing rates, could lawfully determine them according to the Commission's own ideas of the manner, all things considered, in which the public interest could best be served; and, while this conception of the Commission's powers is rather hesitatingly repudiated by the Commission itself, both in the opinion of Chairman Prouty in the "Spokane Case" and in the annual report of the Commission, which is quoted in the brief filed by its counsel in this court, the Commission has, in actual practice, as we shall show, adopted this interpretation of the law. This, of course, in effect amounts to a claim that Section 4 as amended has invested the Commission with power to determine whether the strict rule of that Section shall or shall not become operative, even in the first instance, as to each particular carrier and each particular set of rates covering a long and a short haul. It is the sole purpose of our argument upon this point to demonstrate that if the interpretation of the law thus propounded and adopted is the correct interpretation, the section is unconstitutional. It should be understood that, while much that we

shall say will apply both to the initial applications that actually have been made and passed upon and to possible subsequent applications, our entire argument is intended to refer directly and specifically only to the initial applications that are the subject of this suit.

It was conceded by the Interstate Commerce Commission—and its opinion in this respect was adopted by the Commerce Court—that unless Section 4 provides some definite guide to the discretion of the Commission, when exerted in determining applications for relief from the primary prohibition of the section—that is to say, unless Congress, by at least indicating in general terms the conditions upon which relief shall be granted and denied, has determined generally when, where, and to whom the prohibition of the law shall apply, the entire section as amended must be held unconstitutional because involving a delegation of legislative power which is contained in a provision inseparable from the remainder of an integral enactment, the whole of which must stand or fall with the provision in question.*

The principle thus recognized is particularly applicable to a case, such as this, in which the function of determining *to whom and to what extent the law itself shall apply in the first instance*

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*In this argument we shall assume, without discussion, the integral character of Section 4, which will be conceded and seems too apparent to require argument.

is delegated to an administrative body. That such is, in substantial result, the effect of the provisions of Section 4 as amended must be conceded. These provisions except from the operation of the prohibition of the section all existing rates as to which undetermined applications for leave to maintain them, shall be pending upon the expiration of the six months period of grace, the Commission being vested with power (whatever the terms upon which the power is to be exercised) to grant or deny every such application, thus bringing the rates that are the subject of the application within or excluding them from the operation of the strict rule of the section. This, of course, whether Congress has or has not prescribed rules to control the discretion of the Commission, is frankly delegating to the Commission the authority, controlled or uncontrolled, to determine whether and when a certain rule of conduct shall have the force of law with respect to a given carrier or a given schedule of rates.

It is contended that, even if no rules to guide the Commission's action are provided, the *denial* of an application cannot be an exercise of legislative power, because it but leaves operative the will of Congress as expressed in the general prohibition; but the truth is that the will of Congress is that the prohibitive provision shall not apply to any carrier in the first instance unless the Commission, in the exercise of either a controlled or

an uncontrolled discretion, determine that it shall apply and to what extent, if any, it shall apply; and that the prohibition shall apply thereafter only when, and to the extent, that the Commission, in the exercise of a like discretion, does not relieve the carrier from its operation. It is utterly fallacious to treat Section 4 as expressing the will of Congress in its prohibitory aspect and expressing only the will of the Commission in its permissive aspect. The very concession that the proviso is inseparable from the remainder of the section demonstrates that prohibition and proviso must be read as a whole, as parts of an entire provision, the proviso entering into and qualifying the prohibition, which, in the case of existing rates, is subject to a condition precedent and in cases of subsequent applications to a condition subsequent. When the Commission grants an application for relief such action as much expresses the will of Congress as does a denial of the application. The question is: Has any means been provided to determine what action by the Commission, will in any given case, accord with the intention of Congress?

Of course, if the discretion of the Commission is in fact an arbitrary discretion, that is to say, not subject to control within bounds prescribed by Congress, but to be exercised as the Commission may deem the public interest to require, the power to grant applications for relief at will, or

even subject to partial limitations, is in reality simply an arbitrary power to determine whether the prohibition of the section shall or shall not apply in a given case. The Commission must determine for itself the rules that shall govern its action, and the result that the carrier is subjected to the prohibition of the section and the result that it remains exempt therefrom alike represent the intent and will of the Commission; and upon that hypothesis there is no means of determining whether, in a specific instance, the rule of conduct that is imposed upon the carrier is the rule that Congress wished or would wish applied. Yet the rule so imposed determines the legality of the carrier's future course of action, makes it lawful for it to do or not to do given things, attaches or remits heavy penalties and gives rise to civil rights and obligations. Surely the imposition of a rule entailing such results is legislation, and, if the rule proceeds from the unguided will of the Commission, must be founded upon a delegation of legislative power.

See

Wayman vs. Southard, 10 Wheat., 1.
Yick Wo vs. Hopkins, 118 U. S., 356.
Field vs. Clark, 143 U. S., 649.
Buttfield vs. Stranahan, 192 U. S., 470.
Schaezlein vs. Cabaniss, 135 Calif., 466.
Noel vs. People, 187 Ill., 587.
Mayor, etc., vs. Radecke, 49 Md., 217.
Dowling et al. vs. Ins. Co., 92 Wis., 63.

It would hardly be profitable to discuss in detail the authorities upon this subject. While it is quite true that not all of them can be reconciled, yet it may fairly be said that, subject to the well-recognized exception (and it is a true exception) that powers of local self-government may be delegated within appropriate limits, the almost universal and doubtless the universally *intended* rule is that, in order lawfully to confer upon an executive officer or an administrative body the power to prescribe rules of future conduct for individuals that shall have the force of law, the purpose of the legislature as to the course to be pursued by the officer or body vested with the delegated power must be sufficiently indicated to enable the delegate, in exercising the power and the courts in determining whether the delegated authority has been exceeded, to determine for themselves, with reasonable assurance, whether any given action accords with such specifically indicated purpose; in other words, so that when the action of the delegate shall have been taken, it will be possible to demonstrate that it is or is not an expression of the legislative intent as specifically indicated. Sometimes this intent is broadly stated in the form of a purpose to promote the public health or public safety or public order in particular respects or ways, but always some comprehensive test is and must be afforded. A lawful delegation never is and never can be so broad as to confer *the function of pro-*

tecting the whole public interest in a given subject as the judgment of the officer or administrative body may deem wisest; for the discharge of that function is the very essence of legislative power and discretion.

It is a contradiction of terms to say, as do certain of our opponents, that an uncontrolled discretion to promote the public interest, as an administrative body may deem wisest, may, nevertheless, be only a "reasonable discretion." It is true that, in this country, every exercise of discretion must be reasonable in the sense that when it becomes so unreasonable as to constitute, in substance, a taking of property without due process of law or a deprivation of the equal protection of the laws it also becomes a violation of constitutional right, but the fact that there are constitutional guarantees which limit the exercise of all legislative action, by whomsoever such action may be taken, does not, by supplying limitations upon the exercise of the delegated power, destroy or neutralize the rule that the legislative power, properly defined, cannot be transferred from a legislative to an administrative body. The power, when wielded by such body, is no less legislative, because it is subject to constitutional limitations, than it is when wielded by the constitutionally appointed authority, subject to the same limitations. If the word "reasonable" is used by our opponents in this sense the proposition relied upon

cannot advance the argument a particle. If, on the other hand, the word "reasonable" is used in its ordinary legal sense to indicate that the discretion conferred must be exercised within certain generally recognized limits intended to serve the ends of justice, consistent with the rights and obligations of individuals and susceptible of being maintained by an appeal to judicial authority, then a reasonable discretion cannot co-exist with the unqualified grant of absolute power to decide a given question as the arbitrary judgment of the grantee of the power may dictate, for it is of the very definition of such a power that it is not subject to review because no standard to be applied in reviewing it has been supplied or can exist. The discretion that is guided only by self-imposed standards is not guided at all in any proper sense and cannot be said to be "reasonable" in the sense of the word that we are now considering. The argument that an uncontrolled discretion may, nevertheless, be a reasonable discretion is a concept borrowed from the practice of appellate courts which regulate and correct abuses in the exercise of the judicial discretion of lower courts and judges. Such a conception, however, finds no analogy in a case such as that before us, in which the power of the courts, upon the hypothesis assumed, extends only to the determination of the question whether the Commission has kept within the constitutional restrictions upon the exercise of all legislative power.

It was upon considerations such as the foregoing that the Commerce Court and the Commission (with some qualifications) assumed that guides to the exercise of the power conferred upon the Commission by Section 4 must be found in the section itself, or at least somewhere in the Act to Regulate Commerce, if the section as now amended is to be sustained as constitutional. The Commission and the Commerce Court, nevertheless, came to the conclusion that the Act to Regulate Commerce does contain (in Sections 1 and 3) limitations upon the exercise of the Commission's discretion sufficient to supply the requisite guides for its action. Chairman Prouty, writing for the Commission in the "Spokane Case," and Commissioner Lane, writing for it in the "Fourth Section Case," expressed the opinion that the Commission could not grant relief if to do so involved sanctioning any unreasonable rate or any rate so low as to be unremunerative, or sanctioning rates amounting to an unlawful discrimination, and Chairman Prouty committed the Commission to the view that, given a reasonable rate for such shorter distance and a remunerative rate for the longer distance and a difference between them no more than is compelled by forces not within the carrier's control, it is the Commission's duty under the law to grant relief from the strict rule of Section 4, unless some other unjust discrimination may result therefrom. Commissioner Lane

did not go as far as this, but Chairman Prouty's opinion seems, by reference to the Commission's annual report for 1911 (p. 31, *et seq.*), to express the view of the Commission and in somewhat qualified form was adopted by the Commerce Court.

It may be conceded that if sufficient warrant for erecting such bounds to the exercise of the Commission's power can be found in the act, without violating the intention of Congress as disclosed in and reasonably to be inferred from the act as a whole, the section does not call for the exercise of legislative power by the Commission and is not open to attack, at least as an unconstitutional delegation of such power. Such an interpretation of the law certainly should be satisfactory to the carriers and we do not hesitate to say is in fact satisfactory to the companies represented by us, which probably more than any others have been vitally affected by the Commission's order in these "Fourth Section Cases."

It may, however, be open to doubt whether any such interpretation of the Act with respect to Section 4 is justified. It must be conceded that the Act to Regulate Commerce, by implication, does require the Commission to deny relief under certain conditions, that is to say, if the existing rate submitted for approval or if rates proposed for sanction, are such, as under the circumstances of the case, involve unlawful discrimination; and, inasmuch as the law cannot have intended the Com-

mission to sanction any unreasonable rate, or, in fact, any proposed violation of any law, we may assume that if it appear that an unreasonable rate exist or be proposed and its approval be involved in granting the application for relief from the rule of Section 4 the Commission is bound to refuse its sanction, just as it must also deny any application, if to grant it would be to license the violation of any provision of the law. But, if the Act may properly be deemed to contain an expression of the will of Congress as to when applications for relief from the strict rule of the section shall be and when they may not be granted, it is imperative that there must be discoverable in it not only bounds to the Commission's authority to *grant* relief, but bounds to its authority to *refuse* it; or, conversely, the Act must indicate the conditions under which the Commission *must grant* relief as well as those under which it *must refuse* it; and every concrete case, upon a proper consideration of its facts and a proper application to them of the test afforded by the law, must of itself fall into one class or the other; so that when the Commission, in the exercise of its power to determine ultimate facts, finds that any given condition exists, a *duty* upon its part will arise to *grant or refuse* relief. That this must be true, will readily appear, when we reflect that if the Act merely requires the Commission to deny relief under certain circumstances and does not impose a positive

duty to grant relief under given circumstances, all applications for relief, except those contemplating violations of some other provision of law, may be determined, in the uncontrolled and unappealable discretion of the Commission, acting merely as Congress might act according to its own conclusions as to what the public interest demands—a situation manifestly demanding the exercise by the Commission of the legislative power which the Constitution confides to Congress alone.

Now, it will certainly be asked, as it was asked by Judge Archbald, "Where in the Act do we find any indication that the Commission may not, if it deem such action for the public interest, deny relief in any case, although no provision of the Act to Regulate Commerce, other than Section 4, would be violated by the maintenance of the existing rates or the rates proposed by the carrier?" The Commerce Court has answered this question by saying, in substance, that since Section 4 deals specifically with a particular practice (the charging more for the shorter than for the longer haul) for the reason, merely, that the practice frequently has been a means of discrimination, and the general subject of discrimination is dealt with in Section 3 of the Act and that section may fairly be said to embody the policy of the Act with reference to the subject of discrimination, and since, then, the whole apparent purpose of Section 4 is merely to make impossible, in the particular case

of the long and short haul, any discrimination of the kind denounced by Section 3, it must be assumed that any arrangement that is not violative of Section 3 is not obnoxious to Section 4, and that, therefore, it cannot have been the intention of Congress that a rate arrangement not prohibited by Section 3 should be prohibited under Section 4; that, upon the contrary, in such cases it must have been the legislative purpose to require the Commission to grant relief from the strict rule of the section, at least whenever the proposed discrimination in rates is (*a*) forced upon the carrier by external conditions, under the penalty of the loss of otherwise legitimate business, and (*b*) compatible with the observance of all provisions of law other than those of Section 4; that, inasmuch as such discrimination cannot be unreasonable and is merely a means adopted by the carrier to earn an income that would otherwise be denied to it altogether and to promote a commerce that would not otherwise exist and to render the public a service of indubitable value, it must be assumed that Congress, in passing the Act, did not intend to prohibit or to permit the prohibition of such a practice. While the Commission itself qualifies this conclusion by saying that the coercion of the lower rate must proceed from competition, actual or potential, founded upon superior natural or *quasi*-natural advantages (such as water competition; the competition of shorter rail lines or of

lines not subject to the Interstate Commerce Act) and cannot spring simply from a temptation, yielded to by the carrier or a competitor subject to the Act, to create business by the very act of discrimination (however reasonable), and by saying that the discrimination must be measured by the amount of external coercion and may not be permitted beyond the point where the coercion stops, it nevertheless gives its assent to the proposition that the section is but a specification of one branch of the prohibition contained in Section 3 and is not intended to prevent or to be utilized to prevent any practice not prohibited by Section 3.

It must be conceded that this argument has great force; that it renders an apparently unconstitutional enactment constitutional, makes what would otherwise be an unreasonable rule reasonable and brings the Act into accord with the view which we know, as a matter of history, has always prevailed among the great majority of thoughtful men, both in and out of Congress. If it is unsound, it can be only because the Act does not in fact require the Commission *to grant* any particular application under any specified condition. Yet it is plain that the duty to grant, as distinguished from the duty to deny, applications must be derived, if at all, from the assumed policy of the Act. Section 4, as it stood prior to the amendments of 1910, prohibited a greater charge for the shorter haul than for the longer haul only when the conditions surrounding the two hauls were substantially simi-

lar. Discrimination under such circumstances is necessarily undue and unreasonable and it could truthfully be said that no violation of Section 4, as it originally stood, could occur which was not also a violation of Section 3, and that, therefore—and inasmuch as Section 4, palpably, merely dealt specifically with a certain form of discrimination, dealt with generically in Section 3—it was apparently not the intention of Congress to forbid by Section 4 anything not obnoxious to Section 3. But, it will be asked, "May we leap from the concededly solid ground of this conclusion to the doubtful corollary that Section 4 *in its present form* prohibits only what is prohibited by Section 3?" Section 4 no longer in terms prohibits a higher charge for the shorter than for the longer haul only when the conditions are similar. In words, it prohibits the practice under all circumstances, unless the Commission has exempted the carrier from the prohibition of the Act. It is no longer true that a violation of Section 4, if literally construed, must also be a violation of Section 3. To say that the Commission must give its assent to an exception whenever and to the extent that a difference in conditions renders discrimination reasonable is to assert that despite the elimination from the section of the words "under substantially similar circumstances and conditions" (which afforded the principal visible reason for the assimilation of Sections 3 and 4) the sections remain related as before, the change

effected being limited to prescribing a different method whereby the carrier may assert its right, still assumed to continue, to charge more for the shorter than for the longer haul when and to the extent that the surrounding conditions reasonably compel the discrimination. This assertion is predicated upon the assumption that Congress was endeavoring to accomplish but a single object in amending the section, namely, to compel the carrier to establish its right to differentiate its rates before, and by means of the confirmation of the right by the Commission, before attempting to exercise the right—from which the conclusion is drawn that the substance of the carrier's right has not been modified. Ground for the assumption that Congress did not intend to go further in *fact* as it did in *form* and altogether destroy all right to discriminate, as a right, must be supplied (1) by the presumption that if Congress had intended to alter the relation originally existing between Section 4 and Section 3 it would have made such intention clearly apparent; (2) by our historical knowledge of the views upon this subject that have always prevailed in and out of Congress, and (3) by resort to the rule that has often been deemed to justify even strained—if possible and reasonable—constructions of legislative enactments if the alternative be to declare them unconstitutional.

On the other hand, as tending to impair our con-

fidence in this assumption, it must be remembered that the very assumption involves the concession that Congress, in amending the section, went considerably beyond the mere destruction of the carrier's initiative and substituted for the rule of similarity in circumstances and conditions the much narrower rule of reasonableness—for it must be admitted that many discriminations may be undue or unreasonable, although the circumstances affecting the longer and shorter hauls respectively may be dissimilar. Therefore, looking at the question of interpretation in both its aspects, we are forced to recognize the possibility that while the view of the majority of the Commerce Court may be reasonable and may properly be adopted, the view expressed in the concurring opinion of Judge Archbald may commend itself to the court as the more reasonable and natural interpretation of the section, and it is our purpose to demonstrate that, in such event, the section must be held to be obnoxious to the Constitution.

While, probably, our opponents, when forced squarely to meet the issue, will concede that the choice of construction lies between (*a*) a controlled discretion, which must be exercised favorably or unfavorably to the carrier, as the circumstances may determine, upon the application of tests supplied by the law, and (*b*) a discretion, uncontrolled and therefore unreviewable—nevertheless, counsel for certain of the intervenors maintain, and Commissioner Lane in his opinion in the

"Fourth Section Case" intimates, that, inasmuch as Congress might, as they assert, constitutionally enact an unqualified long and short haul clause it may constitutionally enact a clause qualified as is Section 4 in its present form—giving by grace, through the medium of the uncontrolled discretion of the Commission, what it might withhold altogether. This argument, however, we submit, with entire respect for the views of our opponents, rests upon a confusion of ideas and is an attempt to meet the objection of unauthorized delegation of legislative power with an answer that has force, if applicable at all, only in answer to an objection founded upon the arbitrary nature of the discretion conferred, that is to say, that *the exercise of the power* is obnoxious to the Fifth Amendment as a taking of property without due process of law. The fact, if it be a fact, that Congress might have enacted an unqualified long and short haul clause, does not make the power delegated to the Commission by the qualified clause which it did enact, any less legislative in character; and the fact, if it were a fact, that the power is to be exercised as a matter of grace, would likewise be immaterial, as far as this question is concerned, for the more nearly the exercise of the power to relieve is a matter of pure grace, the more completely it is assimilated in nature with legislative action as distinguished from administrative action. The real point of the argument that our opponents attempt to make is that, when relief from some existing, valid, legal

restriction, from which no *right* to relief can exist, is given as a matter of grace upon the applicant's own request, the applicant is left free to choose whether he will submit to the restriction or throw himself upon the grace of those authorized to relieve him from it, and that therefore neither his voluntary submission to the restriction nor the denial of his appeal for a relief, to which admittedly he has no right, can give him cause to complain of a grant of grace to some one else. Now, there can be no question that in a case in which the assumptions of this argument are justified, the argument completely answers an objection that the exercise of power to grant or deny relief is a taking of property without due process of law, for in the case supposed no right exists that can be said to have the character of property. But such a case is very different from one in which the relief that may be granted is immunity from the operation of an affirmative law, with the result that the granting of the immunity is in substance *pro tanto* an amendment or a repeal of a statute; and still farther from a case in which a right does still exist and the supposed restriction has not become operative and the power in question is to be exercised in the determination of the question whether the right shall be taken away and the restriction imposed and the making of the application for the relief is practically and really coerced by the law. In this last-mentioned case, whether the applicant may or may not have a standing to complain

of his treatment as compared with the treatment of his fellows, it is plain that the arbitrary power exercised in granting or withholding immunity is *legislative in its character.* The very fact that the restriction has its origin purely in legislative will and that the individual has no *right* to exemption from it are evidences of the essentially legislative quality of the power exerted in granting or denying relief; and as relief from legislative action must always be a matter of grace and necessarily requested or accepted by the voluntary act of the recipient, the circumstance that relief can be granted only upon the request of the carrier cannot detract from the legislative quality of the act of determining whether immunity shall be granted or not. In short, if, in the case under consideration, the Commission is authorized to act in its uncontrolled discretion, whether or not the carrier may complain of the law as violative of the Fifth Amendment, it remains true that the Commission is discharging a legislative function which the Constitution has confided to Congress alone.

In point of fact, it would be difficult to discover a plainer case of an attempt to exercise legislative power than the concrete case now before the court. The "Fourth Section Order" does not adjudicate that any ground exists for permitting the carriers to charge less for the longer than the shorter haul. Nor does it find that the intermediate rates in question are unduly high or that the terminal rates

are unduly low or that the relation between the two is obnoxious to Section 3. It does not require specified intermediate rates to bear any prescribed relation to specific terminal rates; nor terminal rates to bear such relation to specific intermediate rates. It does not determine that as a matter of fact the differentials prescribed by the Commission represent the average differences, respectively, between the reasonable rates to the intermediate points and the water-compelled rates to the terminal points. Upon the contrary, it decrees, without pretense of giving ground or reason, that hereafter whatever the terminal rates may be—no matter what relation they may bear to present rates, no matter how much less than a reasonable return for the service rendered they may afford, no matter how complete and peremptory may be the compulsion that determines them, no matter what may be, or what changes may occur in, the cost of transportation to intermediate points—the intermediate shall in no case exceed the terminal rate by exceeding a certain percentage, even though the result may be to compel the establishment of unreasonably low intermediate rates or abandonment of through business acquired and held solely through the medium of terminal rates that in no way violated any provision of the Act to Regulate Commerce. In this we find no observance of, or attention to, the standards that the Commission, in words, concedes are contained in the statute, but a decree by means of

which the Commission designs to inaugurate an experiment, which it believes, doubtless most sincerely, may, or probably will, serve the public interest. If this is not legislation it would be difficult to produce any example of it in connection with the matter of fixing rates.

Still more clearly does the legislative character of the Commission's order appear when we consider the theory upon which it is founded. The Commission avowedly concedes the compelling force of water competition; attempts to measure its force and permits the carriers to meet it at the terminal points provided that they agree to give the benefit of it, in varying degrees, to intermediate points where it does not exist. But the Commission denies the carriers' right to yield to the force of so-called "market competition," that is to say, denies its right to carry any traffic not actually and directly subject to existing or potential water competition, if such traffic can be secured only upon the condition of meeting at the terminals the water-compelled rates, unless such rates be extended to intermediate points at which the water competition cannot operate. In effect, it decrees that rates, which have hitherto been maintained from points in the Middle West to Pacific Coast distributing centers in order to secure traffic that could find a market only upon condition that the rates should be sufficiently low to meet water-controlled rates from the Atlantic Sea-

board, shall be raised or the traffic abandoned unless the carrier shall stipulate, at the behest of the Commission, to give the benefit of the existing terminal rates to non-distributing intermediate points. Despite the fact that the existing rates are as much compelled by forces over which the carrier exercises no control, economically speaking, as are rates applying to the same kinds of traffic originating at points directly subject to water competition, and that the same force of self-interest and the same duty to develop commerce incite it to take the traffic in both cases, the Commission has decided that, as a matter of public interest, this economic force that is building up Pacific Coast centers must be checked, except as it can be made to operate also in favor of the intermediate points. Upon the ethical side it has determined that the bare facts (*a*) that the cost of transportation from, say, Kansas City to Winnemucca is lower than that of transportation from Kansas City to San Francisco, and (*b*) that the carrier may, if it so elect, refuse to transport freight from Kansas City to San Francisco at rates less than are fully reasonable (as of course it may refuse in the case of freight originating in New York), render it unreasonable and unjust to permit the carriage of freight from Kansas City to San Francisco at rates less than the, presumably reasonable rates charged for the carriage of like freight from Kansas City to Winnemucca—

and this despite the further conceded fact that if the discrimination were to cease the through traffic would no longer exist and Winnemucca would derive no benefit from the loss inflicted alike upon the carrier, upon Kansas City and upon San Francisco. That we may not be thought to be exaggerating in describing the theory of the Commission's action we quote from the annual report of the Commission for the year 1911 certain passages, which its brief has already brought to the attention of the court (pages 29-35):

> "At the outset manufacturing was largely confined to the Atlantic seaboard, but as time went on similar manufacturing enterprises were located in the Middle West, for the most part east of the Missouri River and north of the Ohio and Potomac Rivers. These factories produced the same articles as those upon the Atlantic seaboard, and they demanded of the rail lines a rate which would give to their output an entry into the markets of the Pacific coast.
>
> "Suppose, for example, that a manufacturing plant located at Chicago produced the same article manufactured by a similar plant in New York City. In order that this article may reach San Francisco from Chicago by water it must first be transported to New York, where it is taken by the steamship. The cost of carriage by this route is therefore greater from Chicago than from New York, and if the force of water competition were to be alone considered the rate from Chicago to San Francisco ought to be

higher than the rate from New York by the amount of the interior rail rate from Chicago to New York.

"The Chicago manufacturer, however, insists that his rate by rail to San Francisco should be lower than the rate by rail from New York, for the reason that the traffic when taken up at New York moves through Chicago and is hauled a thousand miles further, at a correspondingly additional expense. It is for the interest of the rail line which begins at Chicago to apply a lower rate from Chicago than is applied from New York, since if the traffic originates at Chicago that line obtains the entire freight money, while if the traffic originates at New York it must divide the transportation charges with its connection east of Chicago, which brings the traffic from the Atlantic seaboard.

"As a result of these contending forces it has finally come to pass that the same rates are applied to all territory north of the Potomac and Ohio Rivers as far west as the Missouri River, and sometimes as far west as Colorado common points. * * *

"Manifestly, a compelled rate, to the extent that it is not voluntary, cannot with justice be made the measure of a reasonable rate.

"The Commission desires to make plain at the outset that this principle has been fully recognized by it in passing upon applications under the amended section. Wherever the rate to the long-distance point is fixed and beyond the control of the applicant, we do not require the applicant to observe any relation between the long-

distance and the intermediate rate; we have simply inquired whether the intermediate rate is reasonable.

"It sometimes happens, for example, that a State commission names a rate between two points within a State. A circuitous interstate line desires to meet this rate. Under these circumstances the Commission recognizes the State rate as fixed, and if it finds that the other route is circuitous and that its intermediate rates are reasonable it permits the long line to meet the State rate without reference to its intermediate rates. * * *

"So, again, where a freight rate upon a particular commodity is made by a short interstate line we have permitted its circuitous competitor to meet the short-line rate without reference to its intermediate territory, provided it was clear that the short line did make the rate, that the long line simply met that rate, and that its intermediate rates were apparently upon a proper basis. * * *

"We have established a relation between these Pacific Coast terminal rates and corresponding rates to interior territory because neither the terminal rate nor the interior rate is fixed by causes over which the carrier has no control, but both are, within certain limits, voluntary.

"As illustrating what is meant, take that rate which supports most strongly the position of the carrier, namely, the rate from New York to San Francisco. We have found, and it can not be gainsaid, that merchandise of almost every kind can move by the water route between these points, and

that therefore the rate made by water does limit and control the rail rate between the same points. * * *

"What is above said applies only to the rate from New York to San Francisco, which is in no sense this case. The competition there involved is entirely that of carriage, the only question being whether this merchandise shall go by rail or by water. If transportation competition alone were to govern these rates, the moment New York is left the rate would increase and would continue to increase with the distance from the Atlantic seaboard. * * *

"The Commerce Court holds that San Francisco is entitled to the advantage of its location. What, then, is the advantage of San Francisco as compared with Reno when the traffic is taken up at Omaha? Clearly, transportation conditions do not justify the lower rate to the terminal point, nor do the carriers so claim. The New York rate has been extended to all this territory east of the Rocky Mountains under the influence of other competitive conditions. If we were to assume that the rate from New York to San Francisco was absolutely fixed by water competition—which is not the fact—still every rate outside of New York is voluntarily made by the carrier.

"The transcontinental lines urge that they desire to place Omaha in the San Francisco market as compared with New York. This is not because of any natural advantage which either Omaha or San Francisco possesses, but because it accords with the policy of the railway line leading from Omaha. * * *

"With respect to traffic originating at Omaha, and, indeed, with respect to all transcontinental traffic moving by rail, Reno has an advantage of location, in that the haul to that point is much less expensive than to San Francisco. Every argument which justifies the Southern Pacific lines in desiring to originate this traffic at Omaha rather than at New York applies to a delivery at Reno rather than at San Francisco.

"Here is a carload of merchandise which is to be taken either to Reno or to San Francisco and distributed from one or the other of those points. The territory of distribution is identical. Now, it is a useless waste of transportation energy to haul that carload, as a carload, across the mountains and to haul the less-than-carload business back again instead of stopping the car in the first instance at Reno and making the distribution from that point, which is exactly what the present adjustment of rates compels.

"In a less degree the same consideration applies to traffic which is to be finally consumed at either Reno or San Francisco. The expense of building, of living, of transacting business at Reno as compared with San Francisco determines, to a considerable extent, the development of that community. It is a waste of transportation and therefore uneconomical and wrong to maintain a system of tariffs which are expressly intended to develop these coast cities and to arrest the development of the interior point. If traffic is to be moved by rail, whether from New York or from the

Missouri River, the interest of the carrier requires that it should stop at the intermediate point rather than go on to the more distant point. * * *

"The idea dwelt upon by the Commerce Court, and apparently controlling in its decision, seems to be that so long as the rate at the intermediate point is reasonable, it is a matter of indifference to that locality what rate may be made to the more distant point. This utterly ignores the fact that the railroad is a public servant, owing a common duty to both the long distance and the intermediate point, and that no rate to the intermediate point can be reasonable so long as the carrier is maintaining at the more distant point a lower rate, except in so far as that lower rate is compelled by causes which the carrier does not control. If the carrier by its voluntary act maintains the lower charge to the more distant point, that in and of itself makes the higher charge at the intermediate point unreasonable. * * *

"It will be found that this thing called market competition rests in all cases in the mind of the traffic manager. It is the expression of a desire to obtain business which otherwise would not be obtainable. Its only law is the will of the individual who names the rate.

"To justify their rates from coast to coast the railroads advance water competition, and to justify the same rates from interior points to coast points they rely on market competition. In other words the carriers very properly meet an actual or potential competition by sea by charging less

to the coast points than to intermediate cities. This discrimination is not of their own creating; it is forced upon them and therefore lawful. Then they adopt a policy of their own, which they term 'market competition,' under which they give lower rates from all interior cities two-thirds of the way across the continent to these same coast cities than to intermountain points. *This is the kind of discrimination the Commission has attempted to minimize.*

"We recognize fully the effect of water competition both from Atlantic seaboard cities and from interior points, upon the rates to the Pacific Coast seaboard. * * * But we think there should be a limit to the discrimination that the carriers can effect by reason of their own chosen policy of market competition. * * *"

"The Supreme Court has held, apparently, that this form of competition may be recognized in the naming of rates, but certainly it must be open to the regulating tribunal to determine whether in a particular case market competition, even though it exists, justified the discrimination. Unless that be so, there can be no regulation of rates in this country. This is the underlying issue which will be presented to the Supreme Court upon the appeal from the decision of the Commerce Court." (The italics are ours.)

Here, then, we have the story of "Zone One." This court has held in a long line of decisions beginning with *Texas & Pacific Railway Co. vs. Interstate Commerce Commission,* 162 U. S., p. 197,

that the carrier is entitled to secure and carry traffic, wherever and however possible, if it but observe the restrictions of the act. If the carrier did not make the low (water-compelled) rates to the distributing center on the coast, it could not secure the through business and yet the intermediate point would get no better rates, for the traffic now carried to the coast would not be moved. Higher rates to the coast means no traffic or traffic so reduced in volume as to be unprofitable and burdensome. If the carrier gives the low coast rates to all intermediate points it cannot live and no traffic can be carried by it anywhere. Here is the compulsion that this court has recognized as justifying the carrier in departing from the strict rule of Section 4, as it originally stood, and as relieving it from all imputation of violating the provisions of Section 3 in so doing. It is not—as the Commission assumes—compulsion *to take the business* at a rate less than reasonable, but the compulsion (existing at one point and not at another) *to make the lower rate,* if the business is to be secured. Yet the Commission, considering the desirability of building up the intermediate points, the increasing prosperity of the coast, and the claimed over-grown prosperity of the carriers (in which, unfortunately, our particular clients do not share), has decreed that however natural the existing condition may be, nevertheless, so far as it is the result of market competition, it is wasteful economically, undesirable politically, and un-

warranted by any economic forces that the Commission deems it just to recognize as admissible, and has decreed that it shall be changed, and that hereafter—despite the views expressed by this court—"market competition" shall not be deemed a ground for affording relief from the rule of Section 4. Here, then, we find the Commission devising its own rules for the control of its discretion, founding them upon its own economic and ethical conceptions, and enforcing these rules by arbitrary decrees regulating the future conduct of the carriers, directing the economic forces of the nation and readjusting the balance of the prosperity of its various sections. Could there be a more complete example of attempted legislation?

It hardly seems necessary to say that neither the case of *Louisville & Nashville Railway Co. vs. Kentucky,* 183 U. S., 503, nor that of *Davis vs. Commonwealth,* 167 U. S., 43, conflicts with this conclusion. Neither case involved the propriety of a delegation of legislative power. Indeed, it could not, for the question would not have been Federal in character. In the Louisville & Nashville case the Kentucky constitution operated directly upon a corporation that was a creature of the State and the power vested in the Kentucky Commission to grant relief was derived directly from the people by means of the same constitutional enactment. The power, which in the case of the Federal Government is confided to Congress, was in that case confided to the State Commission.

This power had not been delegated by the law-making body, and, indeed, no claim was made that the act either primarily or through the exercise of the delegated power had actually resulted in the taking of property without due process of law or in the denial of the equal protection of the laws. Davis *vs.* The Commonwealth involved not the power to relieve from the operation of a restriction having its origin in the ordinance there under consideration, but the power to grant a privilege that would not have existed had not some law authorized the grant and which, therefore, could be secured only upon the terms prescribed in the law. The power, moreover, was not strictly legislative, but was one of those powers pertaining to public property which the State holds and exercises as trustee for the members of the public.

The other cases upon which the defendant and the intervenors rely are all cases in which the purpose of the legislative body was sufficiently indicated to afford a guide to the discretion of the officer or body charged with the exercise of the delegated power. It is quite immaterial to this discussion that counsel are unable to agree with the courts that decided some of these cases in thinking that the indications of the legislative intent in question were sufficiently definite to be effective limitations upon the exercise of the power. The court in each case believed itself able to ascertain the legislative intent, and sustained the law because the delegated function was held

to be, in its essence, administrative and not legislative. In every case it was held or assumed that a delegation of legislative power would have been invalid.

In this connection emphasis should again be laid upon the unusual, almost unique, feature that Section 4 is not, in real fact, to affect the rates that are the subject of suit at all, if these applications are granted in so far as they may be granted or until they are denied in whole or in part. It cannot be said, therefore, that in this case there exists a general rule of law from which the carrier has no right of escape for, so far as the rates in question are concerned, there is no such rule of law unless or until the Commission has lawfully denied the applications. The carrier's pre-existing right to maintain the rates in question still exists. The restriction that may take away that right has not yet become operative upon them. The carrier as yet possesses the right to maintain its rates, which are controlled by the old law, not by the new. The function of the Commission, in this particular instance, is to decide whether the old right shall be taken away and the new law applied. Clearly, this, if the action be controlled only by the Commission's estimate of the public interest, is legislation.

We turn now to an entirely distinct proposition, *i. e.*, that, irrespective of the question whether Section 4, as amended, involves an unconstitu-

tional delegation of legislative power, the grant of the uncontrolled power supposed would be unlawful as an attempt to vest a branch of the executive with an arbitrary power not contemplated by our constitution or admissible as a part of our governmental system, the exercise of such power being, in a case such as that at bar, a taking of property without due process of law.

We must again remind the court, at the risk of tedious reiteration, that, upon the particular application to the Commission which is now under consideration, the carriers presented a situation that had already lawfully come into existence, upon the strength of which great investments had been made, a great transportation business had been developed, great enterprises and communities had grown up. The rates that were submitted to the Commission were lawful rates and presumably not open to complaint. Whatever presumption may in the future attend applications under Section 4, certainly *upon these initial applications* the carriers were entitled to the presumptions (1) that the existing published rates to the intermediate points are no higher than reasonable, (2) that the existing published rates to the terminal points are not so low as to be unremunerative, and (3) that the rates to the terminal points are as low as they are as the result of the operation of forces which the carriers cannot control if they are to carry the traffic to which the rates apply.

Interstate Commerce Commission vs. Chicago, etc., Ry., 209 U. S., 108.

In short, upon these applications, as the rates had been lawful under the law as it stood prior to the amendments of June 18, 1910, and were lawful at the time of the consideration of the applications, the Commission was bound to assume, as long as there was no proof to the contrary, that the rates thereafter would retain the qualities that they had presumably possessed and did then possess, *i. e.*, that they were reasonable on the one hand, compensatory upon the other, and that the relation between them had been compulsorily created.

Now, Section 4, as amended, provided, in effect, that the new rule of the section should not become operative as to existing lawful rates unless or until made operative by order of the Commission. But, if the Commission was left by the Act to determine the question whether the carriers should be permitted to continue charging these rates, as its own judgment of the public interest should dictate, it was entirely free to leave one carrier in the enjoyment of the existing situation, unhampered by any restriction that would otherwise be imposed by the section as amended, and simultaneously to deprive some other carrier similarly situated—even a competitor of the first—of the right or privilege to enjoy that situation. In the latter case the result would be to destroy a large part of the carrier's business and *pro tanto* to take away the value of its investments in terminals, in equipment, and in all the facilities that it had provided in order to care for the traffic that

the pre-existing situation had created. If the carrier's competitor were differently treated, the effect of the Commission's action would be to transfer the business, prosperity, and property value of the one carrier to the other. Thus, it will be seen, each carrier is necessarily affected not only by the way the law is applied to its own affairs, but hardly less directly by the way in which it is applied, particularly in the first instance, to the affairs of each of its competitors, actual or potential; and even if the carrier has no *right,* in the existing rate situation—although the rates be strictly reasonable—for which it could demand protection, it has a right in its property which derives its value from its business that entitles it to demand that this value shall not arbitrarily and unnecessarily, and therefore unreasonably, be taken from it and, by the transfer thereof to a competitor, irrevocably destroyed so far as its original possessor is concerned. Because Congress may have the power, if its exercise be reasonably calculated to remedy a given evil, to turn a lawful practice into a civil or criminal offense and to do this regardless of the property loss that may ensue to those whose interests have been built upon the practice in question, it by no means follows that it may *confer upon an administrative body* the power arbitrarily and without reasonable ground to inflict such loss by denouncing a practice in particular instances and approving the same practice in others. Particularly is

this true when, as in this instance, the power to denounce is called into existence by the very act of denunciation performed upon the arbitrary impulse of the body uttering the denunciation. The State of Minnesota had perfect right and power under the Constitution to authorize the Railroad and Warehouse Commission of that State to fix reasonable rates to be charged by the railways of the State in intrastate commerce. The Chicago, Milwaukee & St. Paul Railway Company had no property right in its existing rates. It did, nevertheless, have a property right in its railway and business which gave it a standing to invoke the protection of the Federal Constitution when Minnesota attempted to convert an existing lawful rate into an unlawful rate and to impose another rate in its place, by means of an executive fiat which was not really guided by any standard prescribed by law—that is, any standard that afforded an opportunity to test judicially the correspondence between the concrete action of the Commission and the purpose of the law—but was conceived in and animated by the assumption that the judgment of the Commission must be accepted as infallibly and conclusively reasonable. Such a law this court held to be unconstitutional, not doubting that the Railway Company had a standing to contest it. The vice of the law was simply that it subjected the interests of the individual to the arbitrary action *of an administrative body.* There was no determination that the rates that

were the subject of controversy in that case might not lawfully have been fixed by the Minnesota legislature.

Chicago, Milwaukee & St. Paul vs. Minnesota, 134 U. S., 418.

And see also—

Wayman vs. Southard, 10 Wheaton, 1.
Yick Wo vs. Hopkins, 118 U. S., 356.
Field vs. Clark, 143 U. S., 649.
Dowling et al. vs. Insurance Co., 92 Wis., 63.
Noel vs. People, 187 U. S., 587, and other cases cited *supra.*

There is nothing in *Louisville & Nashville Railway Co. vs. Kentucky,* 183 U. S., 503, that impairs the force of this reasoning. A provision of the Kentucky constitution (which was substantially identical with Section 4 as it existed prior to the amendment of 1910) was a prohibition to charge more for the longer than for the shorter haul under substantially similar circumstances and conditions. The Kentucky Court of Appeals had construed this to mean that as long as the conditions of transportation, as such, are similar no discrimination can lawfully be made on account of dissimilarity in competitive conditions. This court, accepting that interpretation of the law, proceeding from the highest court of the State, held that the Railway Company, being a creature

of that State, held and operated its road "subject to the constitutional inhibition" and "without power to challenge its validity." The court further held that the Kentucky Commission is not simply an administrative body, but that under the Kentucky constitution it possesses the same broad power to impose and relieve from the long and short haul provision that a State legislature would possess, if authorized to act in special cases. In other words, the Commission, under the Kentucky constitution, possessed, *pro tanto,* lawmaking powers and the grant of such powers in the constitution was not open to the objection that might be urged against a legislative grant of arbitrary power to an administrative body. The authority of the case, moreover, was expressly limited to the regulation of a corporation, that is a creature of the State in the constitution of which the regulation is found and a regulation not involving confiscation of property rights. In that case—which was a criminal prosecution for disobedience of the constitutional enactment itself—no application for relief had been made to the State Commission, and the question at issue really concerned not a claim of confiscatory action in violation of the Fourteenth Amendment, but the validity of the grant by the State constitution of powers ordinarily confined to legislative bodies, to a body claimed to be, but held not to be, solely an administrative body.

In our case the amended Section 4 has not

entered into and qualified the constitution and powers of the carriers. The proviso contained in that section is a grant of power made, not by the Federal Constitution, but by Congressional enactment. The Interstate Commerce Commission is an administrative body. So far as these applications are concerned, the question is not whether the carriers may constitutionally be relieved by a quasi-legislative body from a reasonably qualified rule already imposed, but whether they may for the first time be subjected, constitutionally, to an unqualified rule by the arbitrary action of an administrative body. Nor can it be contended that in this case the carriers, by voluntarily submitting their rights to the decision of the Commission, have waived any standing that they otherwise might have had to object to the application to them of Section 4 as amended. As we have said more than once, the rates that were the subject of this suit were all in force at the time the amendments of 1910 were adopted. The situation that exists had been created not by the voluntary act of the carriers, but by the operation of impersonal, economic laws. Enormous interests had been created in reliance upon the principle that underlies the situation and which the Commission now proposes to destroy. The destruction of this principle is the destruction of these interests which are of a value that it is impossible to exaggerate. The carriers were invited by the law to make these applications and were told in effect

that if the Commission should choose to grant them, the law would not be applicable to them at all or would not be applicable in so far as the application should be granted. They were threatened with the most serious penalties if they failed either to make the applications or to submit to the strict prohibition of the section. The option to disobey the command of the section and to insist upon its unconstitutionality in the face of subsequent prosecution was purely illusory.

See—

Ex parte Young, 209 U. S., 123.
Ex parte Wood, 155 Fed., 190.
Affirmed in Hunter *vs.* Wood, 209 U. S., 205.

Indeed, it might be claimed with some reason that application to the Commission for relief was a necessary prerequisite to the assertion by the carriers of their constitutional rights.

To much that we have said, the retort may be made with great force that the very provision of Section 4 "that no rates lawfully existing * * * shall be required to be changed * * * where application shall have been filed * * * until a determination of such application by the Commission," is itself the best evidence that Congress did *not* intend to confer upon the Commission power arbitrarily to grant or deny applications made under the section; for it must be strongly

presumed that Congress did not intend to permit the rule of the section to become operative as to certain portions of the existing situation and to remain inoperative as to other portions of it identical in character with those to which the rule should be applied—a result that might easily follow if the discretion vested in the Commission were held to be an arbitrary discretion guided, if at all, only by the Commission's own conception of the public interest. We concede the force of this argument and have no quarrel with the conclusion but we do insist that the alternative to an interpretation of the section such as that given to it by the Commerce Court is a decision that it is unconstitutional.

In concluding our discussion of this subject we desire to call the attention of the court to the fact that it is alleged in the petition that the operation of Section 4, as given effect by the Commission's order, will be confiscatory, and that the Western Pacific Railway Company, one of our clients, expressly applied for and was denied an opportunity to prove that the orders of the Commission would result in the destruction of the business of the Western Pacific to an extent that would amount to a confiscation of its property. Inasmuch as there is no adjudication upon this point, possibly the uncontroverted allegations of the bill and statements contained in the affidavits would not, without more, afford a foundation for the annul-

ment of the Commission's orders; but, of course, it will not be denied that the Western Pacific is entitled to prove, if it is able, that such would be the result of the Commission's orders if permitted to stand, or that, in case of its success in making such proof, it would be entitled to a decree annulling them. This consideration alone entitles the Western Pacific to an affirmance, so far as it is concerned, of the order granting interlocutory relief and suspending the Commission's order *pendente lite.*

THE ORDER MADE BY THE INTERSTATE COMMERCE COMMISSION, IN SO FAR AS IT PROVIDES THAT RATES FROM POINTS OF ORIGIN IN ZONE ONE TO SO-CALLED INTERMEDIATE POINTS SHALL NOT BE HIGHER THAN RATES FROM THE SAME POINTS OF ORIGIN TO PACIFIC COAST TERMINAL POINTS, IS INVALID—BEING GROUNDED UPON A DELIBERATE DISREGARD OF COMPETITIVE CONDITIONS WHICH THE CARRIERS ARE ENTITLED UNDER THE LAW TO HAVE CONSIDERED IN THE DETERMINATION OF THEIR APPLICATIONS.

Between the Atlantic Seaboard and Pacific Coast terminal points, such as San Francisco, there exists in fact, as the Commission has found, an active competition between water carriers upon the one hand, and transcontinental railway routes upon the other, and the rates which are offered by the water carriers, by reason of the low cost of water transportation, approximately limit the rates that can be charged by the rail carriers. Reasonable charges for transportation by rail from the seaboard to the coast would be much higher than these water-compelled rates. The Interstate Commerce Commission, however, concedes the right of the carriers to meet the water rates in order to obtain the business which would otherwise move by way of the ocean.

Now, there lies in the Middle West a considerable territory which is at once so far removed

both from the seaboard and from the Pacific Coast that no combination of rail and water rates and no all-rail rate is available from this interior territory to the coast, which affords a reasonable return to the carrier for the service performed and, at the same time, is sufficiently low to enable the distributor of the Pacific Coast to purchase commodities in the Middle West as profitably as he can purchase the same commodities upon the Atlantic Seaboard. Products of the interior territory, therefore, can be placed upon the market of the Pacific Coast in competition with products of the Atlantic Seaboard, if the cost of producing the commodities is substantially the same in both sections, only if the rail carriers by whom the products are to be transported are willing to make such reductions in rates below the maxima which might reasonably be charged, as will, together with such concessions in price as may be made by the producers, enable the distributor of the Coast to obtain the commodities of the Middle West at a price substantially equal to the cost to him of like articles produced upon the Atlantic Seaboard. At the same time, the railway systems whose lines connect this interior territory with the Pacific Coast find an inducement to make the reductions in rates thus necessitated (down to the point at which the business ceases to be profitable) in the knowledge that by so doing they may obtain for their lines traffic yielding a profit which they could not otherwise obtain at all, and that all traffic

which they obtain in this interior territory reached by their own lines will yield a revenue to be enjoyed by them exclusively, that is to say, a revenue which they are not compelled to divide with eastern connections forming parts of a through route from the Seaboard to the Coast. Such reductions accordingly are actually made to Pacific Coast terminal points, the rates of course being identical with those from the Seaboard,which in turn are fixed by reference to the water rates. The forces which induce such reductions in rates are as truly competitive as are the forces which induce the reductions made by rail carriers when they fix rates upon traffic moved from the Seaboard itself in direct competition with water carriers. The producer of the Middle West necessarily makes his prices in competition with the producer of the Seaboard, and his desire to compete in the sale of commodities is a portion of the pressure operating upon the carrier, which, together with the pressure of other influences, induces it to make the reduction in its rates necessary to convert the possible competition between the interior and the Seaboard into actual competition in the markets of the Pacific Coast. But the force which principally operates is even more strictly a competitive force than is the pressure just referred to. Goods are transported from the Middle West to the Pacific Coast not at the instance of the producer or of the carrier, but at the instance of the *consumer* and the *distributor* of the

Pacific Coast. He buys in the market in which prices and cost of transportation, both considered, furnish the greatest inducement. This Pacific Coast purchaser says to each water carrier operating between New York and San Francisco, to each transcontinental railway route, and to each route operating between San Francisco and the Middle West: "I will buy in your territory and transport my goods over your line if you will make me rates which are lower than, or as low as, the rates which I can obtain from any of your competitors"; and this offer has the effect of placing the carrier whose line connects, say, Kansas City with San Francisco, in direct competition with the through route which connects New York and San Francisco, and each of them in competition with the water carrier. For, if the line between Kansas City and San Francisco is to carry any traffic for the Pacific Coast purchaser, it must make a rate sufficiently low to enable that purchaser to buy in its territory and lay down the goods in San Francisco as cheaply as he can buy the goods in Seaboard territory and lay them down at the same port by any other means. This, we submit, whether you call it "market competition," as it is ordinarily called, or "rail competition," is in its essence competition of exactly the same sort as any competition between carriers, and, of course, it needs no argument to prove that under such circumstances the rate which the carrier from the

interior to the coast must make is the rate which is controlled by water competition. Moreover, the force which is exerted upon the carrier from the interior to the coast to induce it to make reductions in its rates to terminal points is exactly the same force that operates upon the carriers composing a through route when they make reductions in rates for the purpose of competing with a water carrier. In each case it is the need or the desire of the carrier to obtain traffic, which it could not otherwise obtain, that induces the paying of a price for the traffic in the shape of a reduction in rates. It is of no importance whether the force that thus operates be called "railway policy" or "railway competition" or "market competition." The term "market competition" has, however, been so generally adopted to designate it that we, following the general practice, have referred and do refer to the inter-action of forces that thus induce routes connecting the interior with the coast to make rates to terminal points that will enable shipments to be made in competition with points enjoying the privilege of water carriage as "market competition." Commissioner Lane, in his report in the "Fourth Section Case," referring to this subject, says (21 I. C. C. Rep., 364, at page 367):

> "Ocean competition, says the carrier, brings about lower rates from coast to coast; market competition produces the lower rates from the interior to the coast.

> "'Market competition' is a phrase with which the railroad traffic manager too often conjures. When no other force can be found which brings about a discrimination, market competition is advanced. It is both a sword and a shield; it is used to protect the carrier against attack because of undue discrimination as between communities, and it is a weapon of offense as well, by which one carrier invades the territory of another upon a different basis from that which it grants to its own immediately dependent communities and forces concessions from its rival carriers.
>
> "Market competition, as we have seen is a euphemism for a railroad policy."

On the other hand, Commissioner, now Chairman Prouty, writing in the "Spokane case," (21 I. C. C. Rep., 414) says:

> "Strictly speaking, there is no such thing as 'market competition' which is distinct from competiton between the lines of transportation serving the market. A market can only compete through the agency which transports for it. The carrier makes a rate from a given market, not out of favor to that locality, but because it desires to obtain traffic which will not otherwise come to it. There would seem, therefore, to be little distinction between the competition of markets and the competition of rival railroads."

In Commissioner Prouty's statement we find a recognition, but a refusal to concede the force, of

the statements which we have made concerning the nature of the force to which we refer.

Now, while this market competition, like any other competition, is an effectual compulsion to make rates which will move traffic in competition with water carriage, it is not fully exerted at any point which is not accessible to the Pacific Ocean. As a consequence, and particularly because a great mountain range exists in proximity to the coast, there are many intermediate points upon each of the trans-continental routes that do not enjoy the benefit of the competitive forces to which we have referred and to which, therefore, rates are and always have been made by reference solely to the reasonable cost of the transportation of the commodities. The result of the whole situation is that in many cases transportation rates to Pacific Coast terminal points are lower than rates made upon the same commodities to intermediate points through which the traffic moves to the coast. The Commission has held that this condition, when it is induced by what we have called "market competition," constitutes an unjust and unreasonable discrimination against the intermediate points and has refused to take this market competition into consideration as one of the grounds making for relief from the strict rule of Section 4. They have founded their decision upon the proposition that the action of the carrier in yielding to the force of market competition is a voluntary act, and therefore an undue discrimination. Is it in

fact voluntary? The practical answer is obvious. If the Kansas City carrier does not make the reduction in rates, the New York line transports the commodity that the San Francisco market demands. The carrier whose terminus is in the Middle West loses the business and the revenue derived therefrom. The threat of this penalty is exactly the same compulsion as that which operates upon the New York carrier when he competes directly against the ocean carrier from that port. His agreement to accept less than a reasonable rate is made in order to get the business just as the agreement of the carrier whose line terminates at Kansas City to accept the same rate is made in order to get the business. In one case as in the other, it is "railroad policy;" in one case as in the other it is a policy that can be rejected only under the penalty of not doing business at all. With all respect, we submit that the Commission have missed the real point of the case. First, they have considered the question of competition entirely from the standpoint of the producer instead of from the standpoint of the rate-payer who is the purchaser of the commodities to be transported; second, they have assumed that it is the act of transportation that must be involuntary under the rules adopted by this court, when, as a matter of fact, it is the rate, not the election to do business, which, under the rules established by this court, must be induced by the operation of external forces. The view has been uniformly adopted

by this court, and its decisions are unanimous in holding, that where a force over which the carrier has no control, in the economic sense, compels a rate to the farther point lower than that to an intermediate point, then irrespective of the nature of the force, whether it be water competition, rail competition or competition between sources of supply—the carrier cannot be guilty of undue or unreasonable discrimination in charging a lower rate to the competitive point while maintaining a higher rate to the intermediate point.

The situation in the *Behlmer Case* (Louisville, etc., Ry. Co. *vs.* Behlmer, 175 U. S., 648), is strikingly analogous to the case at bar. The facts material here were (as stated by Mr. Justice White, pages 651, 652).

> "By some of the defendants it was alleged that the transportation of hay from Memphis to Summerville was not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston, and hence the carriers were justified in making a lesser charge to Charleston than was made to Summerville, the shorter distance. The dissimilarity alleged was asserted to have been caused, first, by the existence between Memphis and Charleston of at least eight competing lines of railroad, and, second, by the competition by sea, on hay and grain, and freight of that class, originating in Chicago, New York and Eastern points, and destined to Charleston via the lakes, canal and ocean,

and by part water and part rail. The exact conditions of the competition existing at Charleston because of its situation on the seaboard and consequent relations with markets other than Memphis, was stated in the joint and several answers of the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company as follows:

"(Second.) Charleston is a port on the Atlantic coast, accessible and easily reached from the ports of Baltimore, Philadelphia, New York, Boston, and other Eastern ports from which hay is shipped by water. If the rail lines from Memphis to Charleston charged rates to Charleston as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be brought from Memphis to Charleston, but Charleston would be supplied with hay from North Atlantic ports and the railroads would lose the hay business and Memphis would lose a hay market.

"(Third.) The rates on Western produce to Charleston and other coast cities, such as Savannah, Port Royal, and Brunswick, are made with a view to actual, existing water competition. Western produce, such as grain, hay, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia, and Baltimore over continuous water routes via the lakes and canal or over combined rail and water routes.

"The all-rail lines, seeking to do business between Chicago and Charleston and other coast cities, are compelled to make their rates approximate those which are offered

by the continuous water route or by the combined rail and water routes. The all-rail routes make their rates as much higher as the difference in the service will permit, and those rates are correspondingly adjusted from all Western points, such as Evansville, Cairo, St. Louis, Memphis, etc. At present the all-rail rate from Chicago to Charleston on hay, for instance, is 33c. per 100 pounds; from St. Louis, 28c.; from Louisville, Evansville and Cairo, 23c., and from Memphis, 19c.—the route through Memphis offering facilities for the transportation of hay, grain, and Western products generally from the States of Missouri, Kansas, Nebraska, etc.

"The rate from Memphis to Charleston on hay is, therefore, forced upon the defendant lines by actual existing water competition and other competition beyond the control of defendant.

"The controlling element in said competition is the lake, canal, and ocean transportation between Chicago and Charleston; or the lake transportation from Chicago to Buffalo, or other lake port, thence by rail to New York, thence by ocean to Charleston; or rail transportation from Chicago to Baltimore, Philadelphia or New York, thence by ocean to Charleston."

After the preceding statement of the case, Mr. Justice White, in delivering the opinion of the court (page 654), said:

"This determination of the Commission to restrict its examination of the evidence

> solely to the extent necessary to enable it to ascertain the source and inherent character and not the materiality and substantiality of the competition, and therefore to exclude wholly from view the latter considerations, was predicated on the conclusion that, as a matter of law, no competition, however great might be its influence on carriage and rate making, could be by the carrier taken into consideration, of his own motion, in determining whether a lesser sum would be charged for the longer than for the shorter haul, if such competition arise from the sources or was wholly of the character which it was found by the Commission the proof established the competition relied on to be."

And further, on page 670, he continued:

> "Whilst it is not denied as regards competition arising from other carriers at the place of origin of the traffic, who were subject to the control of the Act to Regulate Commerce, that the decision here under review is not in accord with the rulings of this court, such it is claimed is not the case as to competition not originating at the initial point of carriage. From this premise it is argued that it was correctly decided below that substantial and material competition resulting from conditions existing at the point of delivery, such as accessibility of that place to other lines of transportation from other places by rail or water, or both, was, as a matter of law, correctly decided below to be without legal efficacy in producing dissimilarity of circumstances and

conditions. In this regard, then, the decree below, it is insisted, was correct. But the facts which were presented in the records passed on by this court, in the cases to which we have referred, do not justify the premise from which this presumed difference is deduced. We do not stop, however, to analyze those facts, because, granting, arguendo, the assumption upon which the suggested distinction is based, we think it is without merit. What was decided in the previous cases was that under the fourth section of the act substantial competition which materially affected transportation and rates might under the statute be competent to produce dissimilarity of circumstances and conditions, to be taken into consideration by the carrier in charging a greater sum for a lesser than for a longer haul. The meaning of the law was not decided to be that one kind of competition could be considered and not another kind, but that *all competition*, provided it possessed the attributes of producing a substantial and material effect upon traffic and rate-making, was proper under the statute to be taken into consideration. Indeed, if the distinction contended for were sound it would follow that the greater and more material competition would be without weight in determining whether a dissimilarity of circumstances and conditions existed, whilst the lesser competition would be potential for such purpose. Not only this, but if the distinction be applicable, only that competition which might deflect at the point of origin, the traffic from one carrier to another would be within the purview of that portion of the

fourth section now under consideration, and competition which was so great as to absolutely prevent the movement of the traffic, unless the lesser rate was exacted, would be outside of its operation. This would lead to the construction that the statute, in empowering a carrier, under certain competitive conditions, of his own volition, to exact a lesser rate for the longer haul, contemplated only the interest of some particular carrier and not at all the public interest. Whilst the unsoundness of the proposition is thus shown, from the contradiction which inheres in it, the erroneous conception upon which it rests is fully demonstrated in the following excerpt from the opinion in Texas & Pacific Railway *vs.* Interstate Commerce Commission, *supra*, 211:

"So, too, it could not readily be supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation."

It will thus be seen that, in the case from which we have excerpted at length, there was this same "market" competition that is presented in the case at bar—Charleston, like San Francisco, was able to draw its supplies from competitive markets; the respective rail line was com-

pelled to make the rate from the producing point it served to meet the rate by rail or water from the producing point on the line of its rival, just as the Kansas City Line in Zone One meets the competition of the New York line, and in so doing puts the Kansas City producer on a rate equality at San Francisco with the Atlantic Seaboard producer.

And in the *Behlmer case* it was held that such an adjustment of rates was not an unjust discrimination against Summerville, where the higher rate was charged and where the acute competition encountered at Charleston was lacking.

The decision in the *Behlmer case* was followed in the *East Tennessee, Virginia and Georgia case* (East, etc., Ry. *vs.* Interstate Com. Commission, 181 U. S., 1), Mr. Justice White saying, at page 18:

> "The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the *Behlmer case*, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the

> preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is the cause of the preference, and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination."

And the underlying principle of both of these well-known cases was laid down in the following cases by this court:

> *Texas, etc., Ry. Co. vs. Interstate Commerce Commission*, 162 U. S., 197.
>
> *Interstate Commerce Commission vs. Alabama, etc., Ry.*, 168 U. S., 144.

See also the case of *Interstate Commerce Commission vs. Louisville, etc., Ry.*, 190 U. S., 273, and *Interstate Commerce Commission vs. Diffenbaugh*, 222 U. S., 42.

But, despite the decisions of this court, the Commission, although recognizing the existence of, refused to give weight to the influence of, "market competition" in passing upon the applications that are the subject of this suit. Does not this disregard of the law by the Commission, so far as the adjustment of rates from Zone One is concerned, entitle the appellees to a decree setting aside the order of the Commission, at least as far as it relates to that zone? Is this not an arbitrary action of the Commission contrary not alone to the evi-

dence and even to its own findings of facts in these cases, but taken in deliberate disregard of the law? Said Mr. Justice Lamar, in the case of *Interstate Commerce Commission vs. Union Pacific Railway Co. et al.,* decided at this term:

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Int. Com. Com. vs. Ill. Cent.*, 215 U. S., 470; *Southern Pacific vs. Int. Com. Com.*, 219 U. S., 433; *Int. Com. Com. vs. Northern Pacific*, 216 U. S., 544; *Int. Com. Com. vs. Alabama Midland*, 168 U. S., 146, 174."

And this court has decided in numerous cases that when the Commission, in arriving at a determination concerning an alleged discrimination, refuses or fails to take into consideration any matter which, under a proper view of the law, should have entered into the determination of the question, it is an error of law which results in rendering its action in excess of its powers and amounts to an abuse of power necessitating an annulment of its order and a reconsideration of the subject.

See *Texas & Pacific vs. Interstate Commerce Commission* (Import Cases, 162, U. S., 197).

Interstate Commerce Commission vs. Alabama Midland Railway, 168 U. S., 144.

Louisville, etc., Railway vs. Behlmer, 175 U. S., 648.

East Tennessee, etc., Railway vs. Interstate Commerce Commission, 181 U. S., 1.

This doctrine is also expressly recognized in *Illinois Central Railway Co. vs. Interstate Commerce Commission*, 206 U. S., 441, and in all other cases constituting the same line of authority.

The Commission in its decision admits the existence of "market competition," to quote Commissioner Lane, or "rail competition," to quote Chairman Prouty, at Missouri River points in Zone One; the carriers' evidence overwhelmingly showed it to exist there, but the order of the Commission as to Zone One, utterly ignoring the law

applicable to the situation, denies the application for relief, thus compelling the carrier to charge no higher rates to the interior points from this zone than it does to the terminal points. It would seem difficult, indeed, to conceive of a case more squarely within the doctrine summarized by Mr. Justice Lamar in the *Union Pacific case,* from which we have just quoted.

Let us look for a moment at the effect of the Zone One order from another standpoint, which in a startling manner, illustrates fully the utter inelasticity of the Fourth Section order. In the case of *Commercial Club Traffic Bureau of Salt Lake City vs. A., T. & S. F. Ry. Co., et al.,* 19 I. C. C. R., 218, decided by the Commission at the same time as the cases at bar, the Commission named certain maximum rates as reasonable and made an order upon the carriers requiring them to establish such rates. Now, if the present water-compelled rates to the Pacific Coast be taken as a basis and no higher rates charged to Salt Lake City from Zone One—which would be the practical result of the Commission's Fourth Section order—a large number of the rates prescribed as reasonable maximum rates by the Commission in the *Salt Lake case* will have to be further reduced; in short, by complying with the Commission's Fourth Section order, if we continue to compete with the water lines at the coast, we must reduce our rates to Salt Lake below what the Commission themselves say is reasonable. On the other hand, should

we choose to maintain what the Commission find to be reasonable rates to Salt Lake City, we must advance our Pacific Coast terminal rates, thus giving up business to the coast by failing to meet the water competition there. This is a concrete demonstration both of the compelling force of water competition in its influence upon all traffic, whether carried from the seaboard or from interior points, and likewise of the purely arbitrary disregard of the natural forces that influence the situation that is evidenced by the Commission's order.

In the preceding paragraph we have referred especially to the effect that the Fourth Section order of the Commission relative to the rates from Zone One would have, in relation to rates prescribed by the order made by that body in the *Salt Lake case*. The order of the Commission as to rates from Zones Two, Three, and Four would compel even a greater reduction of the rates found reasonable in the latter case. We will not burden the court with the detail of the comparison here, but earnestly request a study of the affidavit of F. M. Dewees (Record, pages 305 to 312). Nor must it be forgotten that should the Fourth Section order be complied with by the carriers by advancing the coast terminal rates from any of the zones established by the Commission, the intermediate points will still have the same rates; the terminal points will still have the low water rates, merely being deprived of the present acute competition between the rail and water carrier; the

Atlantic Seaboard manufacturer will have the Pacific Coast market to himself, unhampered by the competition of such great interior sources of supply as Chicago, St. Louis, and Kansas City. It is, indeed, difficult, even after prolonged study and most searching analysis, to discover any benefit to the rate-payer, rate-maker or the public at large which can result from the upholding of the Fourth Section order. The only tangible result discernible is an enormous loss to the carrier, the manufacturer of the Middle West and the consumer of the Pacific Coast.

Turning now from the discussion of the general situation affecting all of the carriers, let us look at the peculiar situation that the Western Pacific Railway Company occupies.

The Western Pacific Railway was built during the years 1905 to 1910, inclusive. Its first report was filed with the Interstate Commerce Commission for the month of July, 1911. The older transcontinental lines, the Southern and Central Pacific, the Santa Fe, the Great Northern, and the Northern Pacific, had long been built. Their rate adjustments, whether controlled by water competition, by rail competition or by both, were fully established, and it was necessary that the Western Pacific Railway Company, upon its completion from Salt Lake to San Francisco, should meet these rates if it was to engage in the enterprise for which it was constructed. The Western Pacific

line had been built at a cash expenditure of more than $73,000,000. Interest upon this investment at five per cent, allowing nothing for depreciation, amounts to $3,650,000 per annum, or more than $300,000 per month. The interest charges of the road as a matter of fact are considerably in excess of this sum owing to the necessary discount at which bonds were sold. At the time the orders of the Commission which are the subject of this suit were made, the Western Pacific was earning less than half of this amount. We are sorry to say that this remains its situation. Necessarily the Western Pacific, being the last competitor in the field, has been able to obtain only that business which is not attached by association or interest to other carriers. Evidence is not necessary to inform the court that the business of the railways generally during the last four years has not been particularly thriving. Naturally, the business of the Western Pacific, being in a sense unattached business, is susceptible of being easily diverted and is likely to be lost if its rates be raised. To obtain any business whatever, the Western Pacific has been obliged to engage in the most acute competition of service with the already existing transcontinental systems. Not only has the meeting of their rates to Pacific Coast terminal points been forced by competition, literally and strictly speaking, but if these rates had not been met in the case of traffic not directly subject to water competition, it would have been impossible for the Western Pacific to

meet their competition at all, for the road could not have been operated. Commissioner Lane, in his opinion in the Fourth Section Case, treats carriers as if they were part of one great combination having a single head, each being responsible for all of the conditions obtaining in the case of every other one. In effect, he says that the carriers are not entitled to liberty fully to meet water competition because in a measure they have suppressed water competition and because in a measure they today control or are interested in water transportation lines. He also says, in effect, that the carriers are not entitled to yield to the force of "market competition" because they originated the policy which goes by the name of "market competition." Whether these considerations are entitled to any weight or not—they seem to us entitled to no weight whatever—in the case of the carriers who engaged in the perfectly natural and legitimate war of competition with ocean carriers or in the case of those who first yielded to the incentive to take up business in the Middle West, and as the price of obtaining it made reductions in their Pacific Coast rates, they have no application whatever to the case of Western Pacific, which found the existing conditions as they now are and met them in the course of an actual, natural, legitimate, and necessary competition.

The Interstate Commerce Commission admitted that the applications for relief filed by the carriers in the Fourth Section case should be granted

if the adjustment of rates sought to be maintained did not involve undue discrimination or violate any other provision of the law, and, in fact, admitted that if these guides could not be read into the Fourth Section of the Act the section itself must be held unconstitutional. Said Commissioner Lane in writing the decision of the Commission in the case of "Application for Relief under the Fourth Section" (21 I. C. C. Report, 329, at page 339):

> "The Commission has not been left without a proper test to apply: The test of justness, of reasonableness, of discrimination, of preference and advantage; the test of fair play as between communities. With this construction of the statute, which is historically supported, as well as by those more or less variable measures known as the canons of statutory construction, the statute becomes both practicable and constitutional; we are neither forced to disregard it as a whole nor to eliminate any of its provisions; it does not become an absolute long-and-short-haul section, because the proviso permitting of exceptions remains; the provisional clause does not relegate the entire section to the limbo of unconstitutionality, because we find that it may be administered in thorough harmony with the whole Act, part of which it is; and the tests and standards to be applied are not matters of fancy, but are the express and positive words in the law itself. In short, Congress has undertaken to specify dis-

> tinctly one practice which it wishes especially to destroy and charges this Commission not to permit it to obtain unless such discrimination, such preference, such practice may be shown not to be a discrimination that is unjust, a preference that is undue, or a practice that is unreasonable, because of peculiar facts and conditions."

The Supreme Court has decided that competition, whether "rail" or "water" competition, or the so-called "market" competition shown particularly in the *Behlmer case* and *East Tennessee case, supra,* must be considered by the Commission in determining whether there has been a violation of the Third and Fourth Sections, the decisions holding further that where the carriers were compelled by competition of the kinds mentioned to reduce their rates, that they were not guilty of undue discrimination, for the reduction of the rates to the competitive point was *an involuntary act.*

Irrespective of whether the Commission, upon proper survey of the whole situation, might conclude that the existing rates do or do not involve undue discrimination, the Commission, in what it actually has done, has utterly disregarded the *competition,* call it "rail" or "market," which they themselves admit exists in that territory. We submit that this was palpable error on the part of the Commission, which, under the authorities such as the *Behlmer case* and others cited *supra,*

entitles us to an annulment of the order of the Commission and a reconsideration of the entire case. This must necessarily involve an affirmance of the decree of the Commerce Court, whether this court approves of the reasoning in the decision of Judge Mack or not.

THE COMMERCE COURT DID NOT EXCEED ITS POWERS IN ENTERING THE FINAL DECREE APPEALED FROM.

The appellants contend in substance that since the jurisdiction of the Commerce Court is limited, so far as this case is concerned, to suits to sustain or annul orders of the Commission, the court's decree cannot go further than to annul the Commission's order; that a determination of the applications that were before the Commission occurred when the Commission entered its orders, and that such determination made the prohibition of Section 4 operative; that therefore a decree merely annulling the Commission's order would leave the prohibitory clause of Section 4 to operate upon the rates in question; that the decree actually entered was, therefore, in reality an injunction against an enforcement of an act of Congress and not merely against an enforcement of the Commission's order. Such a concession of wrong and denial of the possibility of remedy seem hardly to call for answer before a court composed of practical men. It will be sufficient to point out that this argument rests upon a false assumption, *i. e.*, that the prohibition of Section 4 became operative upon an unauthorized and unlawful determination of the applications by the Commission. The carriers had, and have, an absolute right to a determination of the applications in accordance with law; to demand that the Com-

mission's discretion shall be exercised within the limitations prescribed by the Act to Regulate Commerce and upon a consideration of all facts that, in a proper view of the law, bear upon the question whether the existing rates involve any undue or unreasonable discrimination.

Texas and Pacific Railway Company vs. Interstate Commerce Commission, 162 U. S., 197.

Louisville & Nashville Railway Co. vs. Behlmer, 175 U. S., 676, and other cases cited *supra.*

Until there has been such a determination of the applications there has been no determination such as the law contemplates. If this were not true, the conclusion would be inevitable that the Commission is vested with arbitrary power to make the prohibition of Section 4 operative, or to leave it inoperative, as its uncontrolled will might dictate. When, then, the Commission, although conceding the carriers' right to a certain immunity from the prohibition, exceeds its powers by fixing limits to the immunity actually granted, such as the law does not contemplate or admit, and entirely denies portions of the applications in evident and avowed disregard of matters that the carriers had a right to have taken into consideration, the consequent annulment of the Commission's order must be deemed to wipe out the unlawful determi-

nation of the applications, which in law was not a determination at all, and to restore the proceeding to its original status, leaving the applications in law undetermined and the prohibition of Section Four inoperative so far as the rates that are the subject of the applications are concerned.

It will be seen, therefore, that the decree of the Commerce Court does nothing more than enjoin proceedings threatened under the color of an, as yet, inoperative law, which would really derive their entire sanction from an invalid order which is set aside by the decree. In other words, it enjoins proceedings which, if taken, must be pursuant to and which derive their vitality and claim of validity solely from the Commission's order. It will hardly be claimed that the power of the court is confined to a formal annulment of the order and does not extend to enjoining proceedings thereunder. The whole decree in its existing form is necessary to give full effect to that portion of it which annuls the Commission's order, and it is but an exercise of the powers expressly conferred by Section 1 of the Commerce Court Act which provides:

> "In all cases within its jurisdiction the Commerce Court * * * shall * * * have and may exercise any and all of the powers of a circuit court of the United States * * * so far as the same may be appropriate to the effective exercise of the jurisdiction hereby conferred."

Certainly no one can doubt that had the Commerce Court never been created and had this suit been brought in one of the former circuit courts of the United States, the decree entered would have been unquestionably within the power of the court.

Respectfully submitted,

F. W. M. CUTCHEON,
JAMES C. JEFFERY,
KERNER EASTON,
For The Denver & Rio Grande Railroad Company and Western Pacific Railway Company, Appellees.

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No. ~~888. 480~~ OCTOBER TERM, 1911

IN THE

Supreme Court of the United States.

Office Supreme Court, U. S.
FILED.
FEB 16 1912
JAMES H. McKENNEY,
CLERK.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION *ET AL*, Appellant,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY *ET AL*, Appellees.

INTER-MOUNTAIN CASES.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE GIROUX CONSOLIDATED MINES COMPANY, INTERVENING PETITIONER IN THE COMMERCE COURT.

WM. A. GLASGOW, JR.,
Counsel for Giroux Consolidated Mines Company, Intervenor.

[illegible], LANE & SCOTT, PRS., PHILADELPHIA.

In the Supreme Court of the United States.

October Term, 1911. No. 883.

The United States of America, Interstate Commerce Commission, et al., *Appellants,*

vs.

Atchison, Topeka and Santa Fe Railway Company, et al., *Appellees.*

INTER-MOUNTAIN CASES.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE GIROUX CONSOLIDATED MINES COMPANY, INTERVENING PETITIONER IN THE COMMERCE COURT.

It is unnecessary to review at length the history of the rate situation in the Inter-mountain territory, as the same appears clearly and fully in the opinions of Commissioner Lane (Record, No. 883, page 68), and of Commissioner Prouty (Record, No. 883, page 149).

We desire to briefly present our views as to the error in the decree of the Commerce Court.

Amendment of Section 4 of the Interstate Commerce Act by Act of June 18th, 1910, and applications by carriers for relief from the provisions thereof.

It appears that after the passage of the Act of June 18th, 1910, amending the fourth Section of the Interstate Commerce Act, applications were filed on behalf of the Atchison, Topeka and Santa Fe Railway Company, *et al.*, appellees in this court, which are set forth in the Record No. 883 (pages 52 to 63, inclusive). All of these applications are in the same form and referring to Application No. 1 (Record, page 52), it appears that the agent of the carriers, parties to the tariffs named therein, "petition the Interstate Commerce Commission for authority to continue all rates shown in the above named tariffs, from eastern shipping points designated to the Pacific Coast terminal points and other points designated, lower than rates concurrently in effect from intermediate points and to intermediate points in Canada and in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and points east therof."

It was further stated (Record No. 883, page 51):—

> "This application is based upon the desire of the interested carriers to continue the present method of making rates lower at the more distant points than at the intermediate points;" and then the application sets forth the reasons assigned by the carriers for the relief "from provisions of fourth section of amended Commerce Act."

So it will be seen that the situation was as follows:—

Section 4 of the Commerce Act, as amended June 18th, 1910, provided:—

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter

being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance."

After the passage of this Act, amending the Fourth Section of the Interstate Commerce Act, the trans-continental carriers found themselves in violation of the express provisions of Section 4, and thereupon they sought some way of protecting themselves against the consequences of exacting the "unlawful" charges established by the tariffs then in effect, and they turned to the proviso in Section 4 of the Interstate Commerce Act as follows:—

"*Provided, however,* That upon application to the Interstate Commerce Commission, such common carrier *may in special cases* after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; *and the Commission may, from time to time* prescribe the extent to which such designated common carrier may be relieved from the operation of this Section."

And thereupon, the applications were filed with the Interstate Commerce Commission, on the seventh day of December, 1910, so that they might be within the following proviso of Section 4:—

"*Provided further,* That no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission in accordance with the provisions of this section, *until a determination of such application by the Commission.*"

The carriers filed their applications on the seventh day of December, 1910, within the six months and therefore they were not required to change any of their rates lawfully established by tariffs pending "a determination of such application by the Commission."

The following facts are therefore clear:—

(*a.*) The rates referred to in the applications filed by the carriers are "unlawful" as being forbidden by express declaration of Section 4 of the Act to Regulate Commerce.

(*b.*) Applications were duly filed so far as time is concerned, by carriers, for relief from the provisions of Section 4 of the Act to Regulate Commerce.

(*c.*) The carriers might continue collecting the rates established in the tariffs duly filed by them and which were declared to be unlawful by Section 4 of the Act, since they filed their applications within six months after the 18th of June, 1910; and

(*d.*) They might continue to charge such rates "until a determination of such applications by the Commission."

Action by the Interstate Commerce Commission upon such applications.

It therefore becomes important to ascertain what action was taken by the Interstate Commerce Commission upon the applications aforesaid. The reports and opinions of the Commission on the various applications filed by the carriers are found in the Record, page 65 and page 149, from which it will appear that the Commission made a thorough investigation of the conditions and circumstances which the carriers alleged in their application as justification for relief from the direct provision of Section 4 of the Act to Regulate Commerce, and which the carriers claimed would justify the Commission in permitting the "interested carriers to continue the present method of making rates lower at the more distant points than at the intermediate points."

The Commission found that by the amendment of Section 4 of the Interstate Commerce Act on June 18th, 1910, by striking from such section the words "under similar

circumstances and conditions," Congress did not intend to leave the Commission without any guide to the exercise of its discretion in granting relief under the provisions of Section 4, but that, when the carriers filed applications "to continue the present method of making rates lower at the more distant points than at the intermediate points," the Commission should ascertain whether the rates then in effect, if continued, would be in violation of any of the other provisions of the Interstate Commerce Act In other words, would such rates be (first) unreasonable as forbidden by Section 1; (second) would such rates be discriminatory as forbidden by Section 3; and, if the rates as then established were not forbidden by Section 1 nor Section 3, then the Commission held that it was its duty to grant the relief prayed for in the applications of the carriers.

The Commission held that a construction of Section 4, giving arbitrary power to the Commission to decline to grant the applications of the carriers, would render Section 4 of the Act to Regulate Commerce unconstitutional and void, but it held that the guide to the exercise of its discretion was to be found in Sections 1 and 3, and that, therefore, Section 4 as amended was a valid constitutional enactment. This view of the Commission was approved by the Commerce Court in its opinion in this cause. (Record, No. 883, page 339.)

Under Section 4 of the Act to Regulate Commerce prior to the amendment of June 18th, 1910, carriers were authorized to charge lower rates at the more distant points than at the intermediate points, provided the transportation of freight to the intermediate and the more distant points were not "under substantially similar circumstances and conditions" of transportation, and it was then necessary that the carrier should determine in publishing its rates whether the transportation to intermediate points was under "substantially similar circumstances and conditions" with the transportation to the more distant point, and, if it arrived at the conclusion that the circumstances and conditions were not substantially similar, then the carrier was authorized to file

its tariffs, charging a lower rate to the more distant point than to the intermediate point. The carrier had to determine in the first place as to the similarity of the circumstances and conditions, and its conclusion was of course subject to review by the Commission.

After the passage of the Amendment of June 18th, 1910, however, the words "under substantially similar circumstances and conditions" were stricken out of the Act, and it was made "unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation" to the intermediate point than to the more distant point, and the only way the carrier could avoid this direct and positive provision of Section 4 was to apply to the Interstate Commerce Commission for authority "in special cases," to do so, and applications for this relief were filed with the Interstate Commerce Commission and the reasons upon which the prayer for relief was based were set forth in the applications, and thereupon, as a necessary prerequisite to the grant of relief, it became the duty of the carriers to show to the Interstate Commerce Commission, and it was necessary that the Interstate Commerce Commission should determine from the facts before it, that the rates then existing in the tariffs of the carriers (*a.*) were not unreasonable, as prohibited by Section 1, and (*b.*) were not discriminatory, as forbidden by Section 3, and unless the Commission reached this conclusion upon the facts presented by the carriers, and their own investigation, it was the duty of the Commission to decline to grant the relief prayed for in the applications filed by the carriers.

It is to be noted that it was not incumbent upon the Commission to find affirmatively that the rates then existing were unreasonable or that such rates were discriminatory, for unless the investigation of the Commission demonstrated affirmatively that the rates were reasonable and fair, it was the duty of the Commission to withhold its assent to the relief prayed for. In other words, unless the Commission could find affirmatively that the rates in the established tariffs were just and reasonable and that such rates did not discriminate as between shippers or locali-

ties, it was the duty of the Commission to withhold its consent that "the interested carriers" might "continue the present method of making rates lower at the more distant points than at the intermediate points," for without such finding, as a basis upon which to grant relief, the law expressly declared such rates "unlawful."

If we adopt, for the purposes of this argument, the conclusion of the Commission and of the Commerce Court that Section 4 of the Act to Regulate Commerce would be unconstitutional unless Section 1 and Section 3 of the Act should be held as a guide to the exercise of the discretion by the Commission under the provisions of Section 4, then we submit that in the exercise of the discretion under Section 4 as to the continuance of the present tariffs of the carriers, the Commission must first find affirmatively, upon evidence, that the rates in such tariffs are reasonable and that they do not discriminate as between persons or localities, before it could enter an order granting the relief prayed for in the applications filed by the carriers.

If we turn now to the report of the Commission, we find, at pages 187-188 in the opinion by Mr. Commissioner Prouty, the following:—

> "Admitting however, that it is for these defendants to say to what extent, if at all, they will meet these competitive conditions, they are not at liberty in meeting them to adopt such a policy, nor to execute the policy adopted in *such a manner as to unjustly discriminate between different localities.*
>
> "They may, perhaps, determine whether they will apply the coast rate, which is fixed by water competition, at the interior point, but if they apply it at one point, they must apply it at others which are similarly situated; they cannot, in the absence of some sufficient reason, give Chicago that rate and refuse it to St. Louis, and Kansas City. They cannot so adjust their whole tariff scheme upon the plea of water competition as to concentrate in these coast

cities commercial and transportation advantages to which their mere location does not entitle them, *and that, in substance, is the effect of the present rate adjustment.*" (Italics ours.)

And Mr. Commissioner Lane, said (page 127):—

"We must regard the proviso in the Fourth Section as subordinate to the preceding clause prohibiting the higher rate for the shorter haul and to carry out this intent of the law, the carrier must establish before this Commission, in order to secure an order of exception thereunder, more than merely its own desire to haul a great volume of traffic between two distant points. It must prove that by such a policy it will not impose unreasonable rates upon any intermediate point and that its policy will not work an injustice too which such intermediate point may fairly complain. Unless it does make such proof, this Commission is not justified under the law in excusing it from adopting its rates to the more distant point as the basis for rates to the nearer points."

And again, at page 129:—

"The carriers herein involved have not shown that undue discrimination was not effected by their rate adjustment between points in Nevada and points in California, nor have they established that the rates to the coast cities, if extended by them, from eastern points outside the zone of water influence, are not fully compensatory."

And again (page 130):—

"Some of the petitions under the Fourth Section which have been considered, are made by carriers reaching California terminals through the southern gateways, Southern Nevada and Arizona. These applications *are also denied* in so far as they involve

the imposition of higher rates upon intermediate points than are applied on commodities from the Missouri River to Los Angeles, San Francisco or other coast terminals." (Italics ours.)

And Mr. Commissioner Prouty said, (page 190):—

"An order will be entered, effective November 15th, denying the application of the carriers, except that the charging of higher intermediate rates will be permitted in accordance with the above findings." (Italics ours.)

It therefore appears that the Commission finds that the evidence offered by the carriers and the investigation made by the Commission does not establish that the rates now in effect under the tariff adjustments, which the carriers ask to be continued to intermediate points, are just and reasonable, nor does the evidence and investigation of the Commission establish that such rates do not discriminate as between persons or localities, and therefore the Commission denied the applications of the carriers "to continue the present method of making rates lower at the more distant points than at the intermediate points."

The Commission went further, however, and suggested terms upon which it concluded it would be justified in approving an adjustment of rates upon the applications of the carriers for relief from the provisions of the Fourth Section and as to this part of the order of the Commission we will refer hereafter.

The Commission determined that the facts did not justify it in holding that the rates to intermediate points were reasonable and just, and further that the facts did not show that there was no discrimination. This was a conclusion of fact by the Commission, and the power of the Commerce Court cannot be *invoked to re-examine this finding of fact by the Interstate Commerce commission.*

If the Commission were unable to find as a fact that the rates to intermediate points were reasonable under

existing tariffs, and that there was no discrimination, it was its duty to deny the applications, and the fact that it indicated what rates it felt justified in approving, cannot affect the force of its denial of the applications.

Denial of relief applied for by carriers.

After the investigation made by the Commission, its order was entered on the thirty-first day of July, 1911, (Record No. 883, page 33), from which it is apparent that the Commission denied the application of the carriers to continue "all rates" shown in the above named tariffs from eastern shipping points designated, to the Pacific Coast Terminal points and other points designated, lower than rates concurrently in effect from intermediate points and to intermediate points in Canada and in the States of Arizona, California, etc. It was ordered by the Commission, "that for the purposes of the disposition of these applications, the United States shall be divided into five zones, the same as are specified in the Transcontinental tariffs of the carriers, and from the first of these zones the Commission absolutely and expressly denied the applications of the carriers. From the second, third and fourth of the zones, it in effect denied the application of the carriers, but stated upon what terms it would be justified in assenting to a continuance of lower rates to the Pacific Coast Terminals than to intermediate points, and therefore it must be held that this order was a declination on the part of the Interstate Commerce Commission to assent to the applications of the carriers, and on the ground that it had not been shown to the Commission that the rates to the intermediate points, as now established, are reasonable and just, nor had it been shown that they did not discriminate against persons and localities. This being the finding of the Commission on the facts, it is submitted that the Commerce Court has no power to interfere with this finding of fact by Commission.

In the proviso of Section 4 of the Act to Regulate Commerce, the Interstate Commerce Commission is given

power "in special cases after investigation" to authorize the carrier to charge less for the longer than for the shorter distances, and in the concurring opinion of his Honor, Judge Archibald, it is said (Record No. 883, page 349):—

> "There must thus in each instance be an application by a carrier, and a special case which entitles the carrier to relief—whatever that may mean—must be set up and made out. And this fixes the limits of the Commission's authority."

And again, at page 350, the learned judge said:—

> "By no device can the whole United States be made a 'special case;' nor can the Commission, upon any just conception of its powers, lay down a hard and fast rule which shall apply to every long and short haul case, wherever originating or whatever its destination, from east to west across the country."

If there is any strength in this suggestion, it would seem to be answered by the fact that the carriers did not present a "special case" to the Commission to be passed upon by them, but filed an application "for authority to continue all rates shown in the above named tariffs," and if the conclusion of the Commission in passing upon all the rates at the same time, did not constitute a "special case," then no such case was presented to the Commission by the carriers as the Commission was authorized to pass upon, and the conclusion would follow that the application of the carriers was defective in that it did not present a "special case" to the Commission upon which it could act, and amounts to no application at all under the Fourth Section of the Act, and, if so, it again follows that no application was filed within six months by the carriers, and therefore their tariffs became unlawful, in accordance with the first provision of the Fourth Section of the Act.

By order of the Commission of July 31st, 1911, it was provided "that for the purposes of the disposition of these applications the United States shall be divided into five

zones, as described, in the following manner." It is difficult for us to understand how there can be any reasonable objections, for the Commission, in responding to the applications of the carriers, to use the division of the territory of the United States made by the carriers in making the application, and in using these five zones or groups, the Commission merely responded to the applications of the carriers as made, "to continue all rates shown in the above named tariffs," in effect, and one of the above tariffs is No. 929, filed by R. H. Countiss, Agent, which makes exactly the same groups or zones used by the Commission.

OPINION OF THE COMMERCE COURT.

In the opinion of the Commerce Court by his Honor, Judge Mack (Record No. 883, page 342), the following appears:—

> "*Second.*—The orders sought to be enjoined do not establish absolute rates for either the long or short haul or prescribe the extent, in dollars and cents, that the short-haul rate may exceed the present or some definitely fixed long-haul rate, but they do *establish a relation between any long-haul rate that* the carrier may put into effect and the short-haul rate, *determining* that from zone one the western short-haul rate shall not exceed the long-haul rate, and that from zones two, three, and four, the short-haul shall not exceed the long-haul rate by more than seven per cent., fifteen per cent and twenty-five per cent., respectively." (Italics ours.)

By referring to the order of the Commission it will be apparent that the court misconceived the order of the Commission, for it is there shown (page 35):—

First.—That the Commission did not undertake to determine the rates from zone one (1) to intermediate points nor to the Pacific Coast terminals nor to "estab-

lish" any relation between such rates but it simply responded to the applications of the carriers and stated "same are hereby denied, effective November 15th, 1911." It was not necessary that the Commission should go further than to deny the application.

Second.—From zones 2, 3 and 4, the applications of the carriers "to continue all rates shown in the above named tariff's" were, *in effect, denied, but the* Commission, desiring "to be extremely conservative in this first application of the new law" (Record No. 883, page 129), indicated how far it felt that it might go *under the evidence* upon applications filed by the carriers, and stated that the carriers "are hereby authorized to establish and maintain, effective November 15th, 1911, commodity rates from all points in zones numbered 2, 3 and 4, as above defined, to points intermediate to Pacific coast terminals, that are higher to intermediate points than to Pacific coast points; provided that the rates to intermediate points from points in zones numbered 2, 3 and 4 shall not exceed the rates on the same commodities from the same points of origin to the Pacific coast terminals by more than 7% from points in zone No. 2, 15% from points in zone No. 3 and 25% from points in zone No. 4."

The Commission did not *determine* what the rates should be from any of these zones to intermediate points nor to the Pacific coast. It denied the applications of the carriers, but indicated in its order "the extent to which such designated common carrier may be relieved from the operation" of the fourth section, if they desired to avail themselves of the views expressed by the Commission.

The carriers were not required to establish any rates or any relative rates, but they were given permission and authorized or permitted to disregard the declaration of the fourth section, provided the rates to intermediate points were not greater than a certain percentage above the Pacific Coast terminal rates.

His Honor, Judge Mack, further said (page 346) :—

> "But neither the equality of rates on shipments from zone 1 nor the relation between the rates on shipments

> from the other zones, as fixed in the order of the Commission, can be sustained upon any such considerations. In so far as the Commission attempts thus to *determine the relation* of the long-and-short-haul rates, irrespective of absolute rates, it goes beyond any authority that has been vested in it, for it is not in the power of the Commission to say that one hundred per cent, one hundred and seven per cent, or any given percentage of an unknown less than reasonable rate to the coast *is necessarily a maximum reasonable and nondiscriminatory rate* from the same point of origin to an interior point." (Italics ours.)

The Commission did not "determine" in its order the relation between rates on shipments from the several zones. It merely authorized the carriers, if they wished to do so, to establish rates themselves upon a basis which the Commission determined from the evidence would not violate Section 1 or Section 3 of the Act to Regulate Commerce. It is to be borne in mind that the Commission expressly denied the applications of the carriers as to shipments from zone 1 and as to the shipments from the other zones, *impliedly denied the applications of the carriers,* and because the Commission indicated in its order that the carriers "are hereby authorized to establish and maintain, effective November 15th, 1911, commodity rates" on the basis set forth in the order and extended this privilege to the carriers which they could avail themselves of or not, as they saw proper, the Commerce Court entered its permanent injunction against the United States and the Interstate Commerce Commission, and their members, agents, officers, servants and representatives (paragraph (*d*) thereof):

> "from enforcing or taking any steps to enforce said order of July thirty-first, 1911, or from instituting any proceedings for the enforcement thereof, or from endeavoring to recover any penalties by reason of disobedience to said order, or from prosecuting or seeking to prosecute by indictment, complaint, or otherwise,

any of the petitioners for disobedience to said order or for a failure to comply with the fourth section of the Act to regulate Interstate Commerce as amended on the 18th day of June, 1910, relative to charging a greater rate for the shorter haul included within the longer than the longer on the matters covered by said applications pending before the Interstate Commerce Commission until said applications shall have been finally disposed of in accordance with the opinion and decree of this court."

There are several remarkable things to be considered in connection with paragraph (*d*) of this order:—

First.—The Interstate Commerce Commission, by its order of July 31st, 1911, did not require the carriers to do anything. It simply, in effect, denied the applications filed by the carriers, and stated "the extent to which" the carriers might go under the evidence in violating the fourth section of the Act.

Second.—Although the Commission in effect denied the applications of the carriers, indicating to what extent it would extend the privilege to the carriers of exoneration from the provisions of Section 4, which they might enjoy or not, as they saw proper, the order of the Commerce Court enjoins the United States and the Interstate Commerce Commission from proceeding against the carriers "for a failure to comply with the fourth Section of the Act to Regulate Commerce as amended on the eighteenth day of June, 1910." In other words, the fact that the Commission, after denying the applications of the carriers, indicated to them upon what terms they would grant applications filed—the Commerce Court seizes upon, to enjoin the United States and the Interstate Commerce Commission from enforcing the provisions of the fourth Section of the Interstate Commerce Act. This, we submit, is going too far.

Under the Interstate Commerce Commission's construction of Section 4 of the Act to Regulate Commerce,

which was approved by the Commerce Court, the questions presented for determination by the Commission upon the applications of the carriers were:—

First.—Would the granting of "authority to continue all rates shown in the above named tariffs" result in the charging of unreasonable rates by the carriers?

Second.—Would the "authority to continue all rates shown in the above named tariffs" result in discrimination as between persons and localities?

Before the Commission could grant the applications mentioned, it must be able upon the facts presented to it, and its investigation, to answer both of the above questions in the negative. Unless the Commission was able, from the evidence and its investigation, to answer both of the above questions in the negative, it was its duty to deny the applications, for the declaration of Section 4 of the Act was positive that the tariffs then in effect were unlawful, and the Commission was only authorized to relieve the carriers from the positive declaration of Section 4 at such time, as it was satisfied upon the facts that Section 1 and Section 3 of the Act would not be violated by the continuance of such tariffs. Therefore the question of fact was presented to the Commission as to whether the tariffs provided reasonable rates, and whether the rates therein set forth were discriminatory and the Commission must be satisfied upon both points before it could grant the applications of the carriers.

From its investigation, and from the opinions of Mr. Commissioner Lane and Mr. Commissioner Prouty, it is perfectly apparent that the Commission found, that, in their judgment, the continuance of the tariffs covered by the applications of the carriers would create unjust discrimination, and this was a finding of fact by the Commission.

Mr. Justice Prouty says (Record, No. 883, page 187) that the defendants were not entitled to meet competitive conditions if their doing so would be "to execute the policy adopted, in such a manner as to unjustly discriminate between different localities," and further on, he says (page

188): "that, in substance, is the effect of the present rate adjustment," the very adjustment which is covered by the tariffs which the applications of the carriers ask to be continued in effect and then Mr. Commissioner Prouty says (page 190):—

> "An order will be entered, effective November 15th, denying the application of the carriers except that the charging of higher intermediate rates will be permitted in accordance with the above findings."

Therefore the finding of discrimination by the Commission in the tariffs, as to which applications were filed, is clear, and the Commission was not authorized and could not give its assent to the continuance of such tariffs, and, as we have shown above, it denied the applications of the carriers on the ground that it was not satisfied that the rates provided in such tariffs were reasonable and just, and further that such tariffs would not continue discrimination.

This finding of the Commission on the facts was final and conclusive, and the Commerce Court had no authority to enjoin the enforcement of Section 4 of the Act to Regulate Commerce because the Commission may have expressed in its order, as advisory to the carriers, what relative rate adjustment the Commission felt, upon the facts, it could approve on applications by the carriers.

This court has settled, once and forever, the proposition that the finding of the Commission upon the facts as to discrimination is final and conclusive, and the courts cannot undertake to interfere with the same. In the case of Interstate Commerce Commission *vs.* Delaware, L. & W. R. R., 220 U. S., 235, Mr. Chief Justice White says, at page 255:—

> "Moreover, the contention is not open for review, because the legal question of the right of the carrier to consider ownership under the second section having been disposd of, the finding of the Commission that to permit the enforcement of the rule would give rise

> to preferences and engender discriminations prohibited by the Act to Regulate Commerce, embodies a conclusion of fact beyond our competency to re-examine."

See also Baltimore and Ohio R. R. Co. *vs.* Pitcairn Co., 215 U. S., 481.

Therefore, the finding of the Commission that the continuance of these tariffs would "give rise to preferences and engender discriminations prohibited by the Act to Regulate Commerce" is conclusive and cannot be re-examined by the courts, and having so found, it could do nothing else than deny the applications of the carriers, and, *eo instanti*, the positive declaration of Section 4 of the Act to Regulate Commerce became effective, forbidding the charging of a higher rate "for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance," and the fact that the Commission, "in its desire to be extremely conservative," may have indicated to the carriers a basis upon which it concluded that it might approve applications for relief from the provisions of Section 4, certainly did not justify the Commerce Court in enjoining the Commission from enforcing the provisions of Section 4 of the Act to Regulate Commerce, which went into effect as soon as the Commission denied the applications of the carriers.

We respectfully submit that the decree of the United States Commerce Court should be reversed for the reasons here suggested.

WM. A. GLASGOW, JR.,

Counsel for Giroux Consolidated Mines Company, Intervenor.

FEBRUARY 14th, 1912.

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 884.
929

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL., APPELLEES.

Appeal from the United States Commerce Court

BRIEF FOR PORTLAND CHAMBER OF COMMERCE, TRANSPORTATION BUREAU OF SEATTLE CHAMBER OF COMMERCE, AND TRANSPORTATION BUREAU OF TACOMA COMMERCIAL CLUB, INTERVENERS.

STATEMENT.

This case is before the court upon appeal from an interlocutory and final decree of the United States Commerce Court enjoining the enforcement of an order made by the Interstate Commerce Commission in the case of the City of Spokane and others against the Northern Pacific Railway Company and others. Said case is numbered 879 on the docket of said Commission and will be hereafter referred to in this brief as the Spokane case.

The court below also enjoined the enforcement of the order of the Commission made on the application of the Transcontinental Freight Bureau on behalf of certain railroads for relief from the provisions of the fourth section of the Act to regulate commerce as amended June 18, 1910, with respect to rates made from eastern points of origin which are higher to intermediate points than to Pacific coast terminals.

The interveners filing this brief are commercial organizations representing the three terminal cities of Portland, Seattle and Tacoma.

Each of these cities is situated on tidewater on the Pacific coast and has direct service by lines of steamships with Atlantic coast points.

While their contention as to the construction of the fourth section and the powers of the Commission thereunder is much the same as that of the carriers, it is in their own behalf and in defense of what they conceive to be their own rights and interests they appear.

They assert the rates they enjoy are made not because of any desire of the rail carriers to discriminate in their favor, but because of reasons the rail carriers must recognize or abandon the business. It is not by the grace of the railroads terminal rates are secured, but by the force of actual water competition.

The interveners contend the effect of the orders as made, and the law as construed by the Commission will deprive the terminal cities of natural advantages, which it is believed was never the intention of Congress.

The supplemental report of the Commission in the Spokane case is set out in full on pages 148 to 192, both inclusive, of the Record in Case 883, and the order on pages 20 to 23, both inclusive, of the Record in Case 884, and on pages 33 to 35 of the Record in Case 883 the fourth section order No. 124 is set out in full.

Appellants draw a distinction between the orders in case No. 883 and in the case at bar in this:

It is alleged by the appellants that the decision or findings on the applications of the carriers for relief under the fourth section is not an order within the meaning of Section 1 of the Act to regulate commerce, but it is simply a decision in response to applications made by petitioners prescribing the extent to which they may be relieved from the prohibition contained in the fourth section.

On the other hand in the case at bar, the order fixed the rates which can be charged on the same commodities from certain originating territories to complaining cities by relation to the terminal rates. The rates to the intermediate points are based entirely on the rates contemporaneously in effect to the terminal cities from the same territory.

The Commission did not name or fix any absolute rates or schedule of rates to be charged in the future, but did establish certain percentages over terminal rates which might be charged as maximum rates to certain intermediate cities from originating territory.

The effect of the respective orders is the same and the distinction drawn is not entirely clear. A discus-

sion of this feature of the case will not be indulged in as it is apprehended all parties are sincerely desirous of having the real point in controversy, i. e. the validity of the order, the true construction of the fourth section, and the powers of the Commission thereunder, finally determined.

THE ORDER.

The order appears in full in the Record, so only the salient features will be set out.

ZONES.

The country is divided into five zones. A general description is as follows:

Zone 1. Duluth, St. Paul, Missouri river points and west.

Zone 2. Chicago territory. This territory lies east of Zone 1 and west of Zone 3.

Zone 3. Buffalo-Pittsburgh territory, all of which lies north of the Ohio river. This Zone lies east of Zone 2, west of Zone 4, and north of Zone 5.

Zone 4. New York and other Atlantic coast territory about as far south as Norfolk.

Zone 5. The southeastern portion of the United States, being the territory lying south of the Ohio and east of the Mississippi rivers—the western line being somewhat east of the Mississippi river. A map with the Zones marked thereon follows page 228 of the Record in case 883.

RATES.

From all points of origin in Zone 1 to Spokane and certain other intermediate points in the states of Washington and Oregon, rates cannot exceed those contemporaneously in effect from the same points of origin to Pacific coast terminals.

From points in Zones 2, 3 and 4 rates to the points above mentioned cannot exceed the terminal rates by the following percentages:

7 per cent from Zone 2.
15 per cent from Zone 3.
25 per cent from Zone 4.

No order was made with respect to rates from points of origin in Zone No. 5.

NO ABSOLUTE RATE ESTABLISHED ON ANY COMMODITY.

It will be observed no absolute rate was fixed as just and reasonable on any commodity from any point of origin to point of delivery, but the intermediate rate is based solely on the terminal rate contemporaneously in effect.

It appears therefore the Commission through its order sought to fix "a just and reasonable relation between the rates" to intermediate and terminal points and not to establish just and reasonable rates to any point—in other words, to correct alleged unjust discrimination.

ORIGINAL AND AMENDED FOURTH SECTION.

There is no question but that the order was made and is sought to be upheld under the provisions and powers granted by the amended fourth section. It is therefore important that the provisions of the original section and as amended be kept clearly in mind.

The sections as originally framed and as amended follow in parallel columns. The omissions from the original section and the additions in the amended section are italicized.

Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge *and*

Sec. 4. (*As amended June 18, 1910.*) That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line *or route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions*

receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission *appointed under the provisions of this act,* such common carrier may, in special cases, after investigation *by the Commission,* be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section *of this act.*

of this act; but this shall not be construed as authorizing any common carrier within the terms of this act to charge *or* receive as great compensation for a shorter as for a longer distance; *Provided, however,* That upon application to the *Interstate Commerce Commission* such common carrier may in special cases, after investigation, be authorized *by the Commission* to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further, That no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of*

this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

The only question sought to be presented in this brief is the interpretation of the amended fourth section and the powers of the Commission thereunder.

The proceedings in the United States Commerce Court are set out in full in the records and will not be extended here.

POINTS

PROVISIONS OF OTHER SECTIONS OF THE ACT DIRECTLY BEARING UPON THE POWERS OF THE COMMISSION UNDER THE FOURTH SECTION.

Section 1 of the Act while amended in certain particulars does not change the standard as fixed in the original act, to-wit:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3 was not amended in any particular. Under this section *undue* or *unreasonable* preference or advantage to any person, particular description of traffic or locality is forbidden.

It thus appears that provisions of the Act with respect to the requirements to maintain reasonable rates and against undue or unjust discriminations remain unchanged.

Section 15. By this section the Commission is empowered under the provisions of the Act to determine and prescribe "just and reasonable individual or joint rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged," etc., etc.

It is in connection with these provisions the amended fourth section must be interpreted.

CONSTRUCTION OF THE FOURTH SECTION PRIOR TO AMENDMENT OF JUNE 18, 1910.

The court below thus states the situation:

> "Under the fourth section as originally framed, it was decided (*E. T., etc. Ry. Co. v. I. C. C.*, 181 U. S. 1 and cases cited therein) that carriers might, in the first instance and without application to the Commission, make the rate less for the long than for the short haul, if, in fact, the circumstances and conditions were not substantially similar, taking their chances on a subsequent determination by a court that they had erred in so doing and had thereby violated the law." (Record 883, page 343.)

However the rates to intermediate points were required to be just and reasonable and the competition "not artificial or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making." Unjust discrimination was as unlawful then as now. A carrier could not then lawfully name a competitive rate so low as to cast a burden on other traffic,—in other words, transport commodities for less than cost.

REASON FOR CHANGE IN SECTION.

Abuses arising out of the exercise of the privilege by the carriers to determine in the first instance the necessity for relief from the operation of the long and short haul provision developed. There were many charges of unjust discrimination and the demand for

relief culminated in the enactment of the amended section. The evils condemned and the vice sought to be eliminated were *unjust* discriminations and *undue* and *unreasonable* preferences, which had arisen under the operation of the fourth section, as above stated. In other words it was believed by taking the power of initiative from the carriers and making it subject to investigation and consent by the Commission, the evil would be corrected. It was not discriminations or preferences *per se* that were condemned but *unjust* discriminations and *undue* and *unreasonable* preferences created by the acts of the carriers. It was not the law, but the abuse of a right under the law, that was the underlying cause of complaint.

PROPOSED CHANGES.

The amendments suggested were two,—one providing for an inflexible long and short haul clause; the other, conceding what was perfectly apparent, that exceptions were necessary in the operation of the long and short clause, but also that it was necessary to limit the rights of the carriers as theretofore exercised thereunder.

As finally amended the substantial changes were the elimination of the clause "under substantially similar conditions and circumstances" and the addition of the last paragraph of the law which distinctly recognizes the right of the carrier to compete with water routes by reducing its rates and provides that such competitive rates cannot be increased unless after hearing "it shall be found that such proposed

increase rests upon changed conditions other than the elimination of water competition." In other words the act as amended took from the carriers the right in the first instance to determine whether conditions justified the lower rate for the longer distance and distinctly recognized water competition as a factor the carrier might consider, and provided a penalty for destructive competition.

It must have been assumed by the Commission and the court below that this provision does not affect the legality of the order or shed any light on the interpretation of the section as no reference was made to it by either body.

It is believed, however, that in interpreting this section, this provision has a bearing and should be considered.

A careful analysis of the amended section and those with which it must be read shows that, while Congress intended to make and did make certain changes affecting the operation of the section and its application, it recognized the fact that cases existed and would arise, when in the nature of things a lower rate to the distant point would be justifiable.

There is nothing, however, that indicates that Congress had in mind to alter in any respect the conclusions of this court as to what does or does not constitute unjust discriminations, or by statute to declare "undue" or "unreasonable," preferences or advantages compelled by causes not within the control of the carrier, and certainly water competition always has been, and we assume always will be, recognized

as a justification for a rate advantage if it can be so characterized.

INTERPRETATION OF THE AMENDED FOURTH SECTION.

The changes effected by the amendments to the section have been pointed out, and a comparison of the original section with the amended section demonstrates that the important change was the elimination of the words "under substantially similar circumstances and conditions," thus taking from the carrier the right in the first instance to determine for itself "whether it may disregard the rule of that section" and compelling it "to submit the question to the Commission."

The question to be submitted is one of *fact*, whether there are conditions which justify a disregard of the rule.

Both the Commission and court below held that standing alone the fourth section would be an unconstitutional delegation of power. As was said by the Commission in the report in the Spokane case (Record 883, page 166):

> "If this section were read by itself and even taken at its literal face meaning, the Commission would possess unrestricted power to grant or deny such application. It could permit in one case and refuse in another, according as its fancy might dictate. So construed, the proviso would probably be void as a delegation of legislative authority."

Both the court and Commission held that the entire act must be examined to ascertain the true meaning of the proviso and that thus examined, and particularly with reference to sections 1 and 3, the section was held to be constitutional.

UNJUST DISCRIMINATION THE BASIS OF THE ORDER.

There can be no question but that the order is based solely upon the alleged unjust discrimination resulting from charging less at the distant than at the nearer point, or to put it in another form, that the relationship of the rates is unjust and unreasonable. Just and reasonable rates to any point were not attempted to be established.

If the rate at the distant point is caused by water competition, is not below cost and thereby burdens other traffic, and is lower than at the intermediate point and the rate at the intermediate point is just and reasonable, do these facts under the law justify a conclusion that unjust discrimination exists?

FINDINGS OF COMMISSION AS TO BASIS OF ORDER.

In the report of the Commission in the Spokane case (Record 883, page 155) will be found these statements (Italics ours):

> "In the opinion of June 7, 1910, 19 I. C. C. Rep. 162, at page 174, the Commission said:
>
> 'In fixing these rates we have proceeded upon the view that, *under the present decisions of the Supreme Court of the United States,*

we could not use the rate to Seattle as a standard by which to measure that to Spokane. If this were otherwise, if we were free to take into account all the competitive conditions existing both east and west and to determine what, in the light of all these conditions, would be a just and reasonable relation between the rates of Seattle and Spokane, a somewhat different question would be presented.'

On June 18, 1910, subsequent to the promulgation of the foregoing opinion, the fourth section was amended. The city of Spokane claims that the amended section now in express terms forbids the discrimination against which that locality has always protested. It seems proper to inquire, therefore, whether, under that section in its present form, this discrimination is forbidden or can, if found to exist, be corrected by an order of this Commission. In this view we caused the applications of carriers for leave to depart from the rule of the fourth section in the making of these transcontinental tariffs to be assigned for hearing and argument at the same time with these and cognate cases. The questions presented under those applications have been elaborately discussed; additional testimony has been heard, and the whole matter is now before us for disposition. In disposing of it we have to inquire:

1. What is the duty and authority of the Commission under the present fourth section?

2. *Can the Commission under that section make an order in one or both of these cases which will obviate the necessity of prescribing a schedule of reasonable rates?"*

Page 169, Record 883:

"Bearing in mind the authority which the Commission now administers in prescribing a rea-

sonable rate and in declaring and correcting an undue preference, it seems evident that the purpose of Congress was to commit to this body the duty of determining whether if the carrier was permitted to charge a higher rate at the intermediate point that would result in a violation of the provisions of the act. But in so doing the Commission can not act arbitrarily. It must investigate each case, and if after such investigation it is of the opinion that a departure from the rule of the fourth section would not result in unreasonable rates or undue discrimination it must permit that departure. If, upon the other hand, it is of the contrary opinion, it must refuse that permission. Such is the only possible construction which can be put upon this section in connection with the entire act, and if any doubt as to real purpose of Congress could exist, it must be effectively put at rest by an examination of the history of the passage of this measure."

Page 173, Record 883:

"Congress has evidently had it in mind at all times that cases might arise where carriers should properly be permitted to charge a lower rate at the more distant point, and has intended to arm the Commission with authority to do justice in such instances by permitting a deviation from the rule of the section and prescribing the amount of that deviation. *This authority can be exercised by prescribing the maximum difference which may be made against the intermediate point, or by fixing a rate at the more distant point below which the carrier must not go, or by defining the territory from which the higher intermediate charge may be made.*

We hold that under the amended section it is the duty of the Commission to investigate each

application made by a common carrier for leave to depart from the rule of the section. If we are of the opinion, upon a view of the entire situation, that to grant the application will not result in unjust or discriminatory rates and practices, then it should be granted; otherwise it should be denied; and the Commission may, if in its opinion an unlimited departure from the rule of the section ought not to be granted but that a limited departure should be, prescribe in any way that is definite and certain the extent to which the departure may be made. So interpreting the section, we proceed to inquire whether the relief to which the complainants are, in the opinion of the Commission, entitled can in either of the above cases be secured by an order under the fourth section either upon the applications of the carriers for relief under the section or in the cases themselves."

Page 191, Record 883:

"It may be asked why the schedule of rates suggested by the Commission as reasonable should not be ordered in. The answer is that carriers should be permitted in so far as possible to adjust their own tariffs and that it seems probable that in compliance with this order carriers must establish rates in substantial accord with those suggested by us. *It should be ever borne in mind that the acute complaint in this case is the discrimination and not the unreasonable rate. Obedience to this order will doubtless result in some rates from the east which are higher and in others which are lower than those suggested by the Commission since we did not then feel at liberty, as the complainants requested, to make the Spokane rate depend upon the coast rate."*

From these extracts from the report of the Commission in the Spokane case there can be no question but that unjust discrimination predicated upon the existence of lower rates to coast terminals than to intermediate points and the power of the Commission to correct the same under the provisions of the fourth section are the basis of the order.

WATER COMPETITION AT COAST TERMINALS.

Are there circumstances and conditions existing at coast terminals justifying a disregard of the statute?

In the language of the statute do the facts show the existence of "special cases" which will justify the Commission to authorize the carriers "to charge less for longer than for shorter distances?"

The order itself answers the questions, for the Commission has authorized this to be done from certain territories.

However, it is believed that light will be shed on the controversy by quoting the facts as found by the Commission in this case.

In the first report filed in the Spokane case February 1, 1909, after hearings extending over a long period of time, this question of fact was passed on.

The following quotations are from 15 I. C. C. Rep. 376, the pages being given on which the quotations will be found (Italics ours):

> *"It can not be denied in view of these uncontroverted facts that water competition does exist and that it does produce a controlling effect upon*

rates to the Pacific coast from many eastern destinations. It is beyond doubt that this competition absolutely limits those rates from New York and points within a few hundred miles of New York to Pacific coast terminals. There is no assignable reason why a shipper should pay from 15 to 50 per cent more money to transport his goods by rail when the water service is equally reliable and almost as expeditious. Up to the present time the transportation facilities by water available have not been sufficient to produce a demoralization in those rates. *These water carriers do not yet need to offer the inducement which they might profitably. The rail rate to New York is not absorbed nor are low rates made from New York even.* When this business comes to be solicited by the water routes in the same way that ocean and rail business is today solicited by water lines for southern and western destinations, transcontinental carriers will be confronted with a situation much different from that which they meet today; but today even they are compelled to fix their terminal rates in view of this competition.

* * * * * * *

"This water competition not only limits the rates which are now in effect from the Atlantic coast to Portland, Seattle, and Tacoma, but the existence of this competition, especially in view of the approaching completion of the Panama Canal, must be a dominant factor in determining both the present rates and the future policy of these transcontinental lines." (Pages 386, 387.)

* * * * * * *

"We are constrained to hold that the defendants do not by the scheme of rates under consid-

eration violate the third and fourth sections." (Page 388.)

* * * * * * *

"We have seen that in 1900 the American Hawaiian Steamship Company put into service a line of steamships via the Straits of Magellan, and by the year 1902 this company had extended its operations as far north as Tacoma and Seattle. Traffic had also begun to move to some extent via this line and these Sound ports to Spokane. *For the purpose of meeting this competition the defendants put into effect, about 1902, certain additional commodity rates to Spokane, but the general situation was not changed.*" (Page 390.)

In the report of the Commission in the record before the court this subject was again examined *in extenso.*

We cite from pages in Record 883. Referring to former report the Commission said:

"The defendants insisted that terminal rates were induced by water competition, that therefore the circumstances and conditions under which rates to Spokane were made differed from those obtaining at Seattle, and that for this reason the fourth section did not apply. *The Commission found as a fact that there was water competition at Pacific coast terminals which influenced the rate from eastern territory, and held that in view of this fact the terminal competitive rate could not be used as a standard by which to measure the reasonableness of the intermediate rate to Spokane.*" (Page 154.)

* * * * * * *

"The complainants insisted upon the original hearing, and have renewed the claim at every stage of this proceeding, that there is no active water competition; that the whole claim of water competition is put forward by the defendants as a pretense by which to justify the rank discrimination against interior points. *The first inquiry is therefore whether water competition actually exists which has produced and does produce an effect upon rates from the Atlantic seaboard to the Pacific coast from New York to San Francisco, treating these two cities as illustrative of the localities in which they stand.*"

"*This question of fact has been often considered in the past, and with but one unvarying result.* The circuit court of the United States has twice found, once in a proceeding concerning these very rates to Spokane, that active water competition does exist which controls the coast rate. *Farmers' L. & T. Co. v. N. P. Ry. Co.*, 83 Fed. Rep. 249; *I. C. C. v. A., T. & S. F. Ry. Co.*, 50 Fed. Rep. 295.

This Commission has repeatedly found and recognized the same fact. (Citing a long list of cases.)

"*In the original hearing of the Spokane case we re-examined that whole question and reaffirmed our decision. City of Spokane v. Northern Pacific Ry. Co.*, 15 I. C. C. Rep. 376.

"*In the recent hearing* upon the applications of transcontinental lines for leave to disregard the rule of the fourth section *evidence has again been produced* upon this subject *which conclusively shows that the previous finding of the Commission is right.* We had before us in the Spokane case the manifests of two ships from New York to San Francisco, and in the last

hearing we had the manifests of two other ships. They showed in detail the articles transported, the point where they originated, the destination for which they were intended, and the rate under which they moved. *These actual transactions prove more conclusively than any mere statement that almost every article which is the subject of ordinary commerce between the coasts can and does move from New York to San Francisco by water at rates materially lower than those maintained by the defendants by rail.* We have used San Francisco as the destination port upon the Pacific coast, and in some instances rates from New York to San Francisco are a trifle lower than to other coast cities, but, generally speaking, the San Francisco rate is maintained at Los Angeles, Portland, Seattle, Tacoma, and other points upon the coast."

"Passing for the time being the extent and effect of this competition at interior points *it must be found as a fact that there is real and active water competition between New York and San Francisco, between the Atlantic and the Pacific coasts, which does limit the rate of transportation which can be charged by rail between those points upon nearly every article which moves by rail.*"

"It is said that the amount of the movement by water is so insignificant that it should be disregarded. The amount is not insignificant. *If reference be had to the traffic which actually originates upon the Atlantic seaboard a considerable percentage moves by water, but the significant thing is not the amount of the movement, but the ever-present possibility of that movement.* As was said by the Supreme Court in the Alabama Midland case, speaking of the effect

produced upon rail rates to Montgomery by the Alabama river:

> ' * * * When the rates to Montgomery were higher a few years ago than now, actual, active water-line competition by the river came in, and the rates were reduced to the level of the lowest practicable paying water rates, and the volume of carriage by the river is now comparatively small; but the controlling power of that water line remains in full force, and must ever remain in force as long as the river remains navigable to its present capacity.'

So here the ocean is ever present. The possibility of using it as an avenue of transportation is ever open, and the fact that it will be used, if for any considerable length of time the defendants maintain rates which are so high, or so adjusted as to render it profitable for shippers to resort to that means of transportation, is never doubtful." (Pages 175-178.)

* * * * * * *

"Competition at the present time seems to be more active. An independent line has been established upon the Pacific coast. The Panama Railroad has become an actual competitor for this business. *The American-Hawaiian line, finding competitors in the field, has been compelled to reduce its charges.* Testimony recently given before the Commission showed that a line of steamers had been put on from New Orleans which was actually handling consignments of lumber from New Orleans to San Francisco for 45 cents per 100 pounds and that shipments of lumber were moving from Memphis to San Francisco at 55 cents per 100 pounds, as against the present transcontinental rate of 75 cents.

Everything indicates that the effect of this water competition will increase rather than diminish from now until the completion of the Panama Canal and when that waterway is open for business both rate and facility will be very much better than today." (Page 183.)

* * * * * * *

In the supplemental reports both in the Spokane case and in No. 1623, filed in the cases of *Railroad Commission of Nevada v. Southern Pacific Co. et al.*, and in *Maricopa County Commercial Club v. Santa Fe P. & P. R. Co. et al.* (Record 883, page 64), there will be found statements to the effect that the ocean rates were not as low as they might be under fiercer competition and in the latter report there is an historical account of the constant and persistent efforts of the railways by any and all means to eliminate water competition or to minimize its effect.

These efforts were carried to the extent of subsidizing the Pacific Mail by buying its space at an agreed figure and finally by actually securing control of this company by purchase of a majority of its capital stock. So strenuous were these efforts thus to control the water routes that the merchants in San Francisco were driven to found a line of their own.

From this account and that in the Spokane report it appears there has never been a time when there was not only potential competition but actual competition and at this time there is more freight being carried by sea from the Atlantic coast to the Pacific coast in shorter time and more satisfactorily than in the history of the trade.

The statements as to the control attempted to be exercised over the water carriers prove too little or too much.

If the competition has not forced the rail rates as low as may be, but still below a rate that could otherwise be charged, then there is less justification for a finding of unjust discrimination against interior points.

So too with the other statements, if the force of water competition has been so great as to induce the methods practiced on the part of the railroads even to the extent of expending millions of dollars in buying space on competing steamers, and in spite of their efforts water carriage and competition are constantly growing in volume and intensity, then indeed must it be a real substantial force to be considered and to be measurably met, if the rail carriers are to participate in the coast business.

It would seem the coast cities, not the intermediate points, would be the chief sufferers by the acts of the carriers, for the efforts of the carriers were centered on eliminating, if possible, competition at the only points it is direct and effective.

Moreover the facts, as recited by the Commission, furnish irrefutable evidence that as respects the charge that the coast cities have been the recipients of favors and discriminations at the hand of the carriers, the reverse is the truth. On the contrary the carriers have been unceasing in their efforts to deprive them of the advantages of their location in which efforts they have been measurably successful.

After all is said, the repeated findings of the Commission in this case "that water competition does exist and that it does produce a controlling effect upon rates to the Pacific coast from many eastern destinations," are true.

It is a *fact,* as the Commission finds, that "It is beyond doubt that this competition *absolutely limits* those rates from New York and points within a few hundred miles of New York to Pacific coast terminals."

And again:

> "This question of fact has often been considered in the past and with but one unvarying result. The circuit court of the United States has twice found, once in a proceeding *concerning these very rates to Spokane,* that active water competition does exist which controls the coast rate." * * * "This Commission has repeatedly found and recognized the same fact." * * * "In the original hearing of the *Spokane case* we re-examined that whole question and reaffirmed our decision." * * * "In the recent hearing upon the applications of transcontinental lines for leave to disregard the rule of the fourth section evidence has again been produced upon this subject which conclusively shows that the previous finding of the Commission is right."

THERE BEING NO QUESTION OF THE EXISTENCE OF WATER COMPETITION UNJUST DISCRIMINATION CANNOT BE PREDICATED ON RATES COMPELLED BY IT.

Attention has been called to the fact that no change affecting this question was made in the first section, that the third section was not amended in any particular, and to the changes made in the fourth section.

The third section and questions involving undue preferences and unjust discriminations in connection with the long and short haul clause has been repeatedly passed on by the Supreme Court of the United States. Those questions had been finally and conclusively settled.

Congress knew of these decisions and the construction this court had placed upon the law. Commerce had adapted itself to them, investments were made upon the faith of them, indeed the whole system of rail transportation in this country was operated under them.

It will not be imputed to Congress that in legislating respecting an act in aid of commerce that it would enact legislation destructive of it.

Moreover in construing the terms of a statute it will be presumed Congress legislated with knowledge of the interpretation placed upon a statute by the courts. As has been pointed out with these sections judicially interpreted the only substantial change in the fourth section was the elimination of the phrase "under substantially similar conditions and circum-

stances," leaving the first and third sections unaltered.

In *East Tennessee V. & G. R. Co. v. Interstate Commerce Commission,* 181 U. S. 1, the Supreme Court passed on this very question and held that a disparity in rates produced by competition of the character shown to exist in this case was not an "undue" preference or "unjust" discrimination and was not within the condemnation of the act.

The language of the court is clear and unequivocal.

At page 12 the court says:

> "But since the ruling of the Commission was made in this case, it has been settled by this court that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point. That is to say, that the dissimilarity of circumstance and condition pointed out by the statute, which relieves from the long and short haul clause, arises from the command of the statute, and not from the assent of the Commission; the law, and not the discretion of the Commission, determining the rights of the parties. It follows that the construction affixed by the Commission to the statute upon which its entire action was predicated was wrong. Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alamaba Midland R. Co., 168 U. S. 144, 164, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S.

648, 654, 655, 44 L. ed. 309, 311, 20 Sup. Ct. Rep. 209."

It was urged by counsel for the Commission that the discriminations practiced against Chattanooga and in favor of Nashville, brought the case *"within the evil which the Act to regulate commerce was designed to remedy, and that competition, no matter how forceful, should not be held to nullify the law itself—in other words, should not be held to justify the very wrongs which the law was enacted to remedy."*

The court, in considering this proposition, amongst other things, at page 17, said:

> "But in substance this reasoning only amounts to the assertion that the settled construction of the statute, by which it has been held that real and substantial competition gives rise to the dissimilarity of circumstance and condition pointed out in the fourth section, is wrong, and should be overruled."

Continuing on the same page the court said:

> "True it is that all the provisions of the statute must be interpreted together, and because this is the elementary rule the argument now pressed upon our attention is unsound. If it were adopted, it would follow of necessity that competition could never create such a dissimilarity of circumstance and condition as would justify the lesser charge to the competitive point than was made to the non-competitive point. This would be the inevitable consequence, since under the view which the argument assumes it would be impossible for the lesser rate to prevail to the competitive point without creating a pref-

erence in favor of that point, and without giving rise to a discrimination against the non-competitive point to which the higher rate was asked. Thus the reasoning conduces to the deduction which it is advanced to refute; that is, the assumption that the statute at one and the same time expressly confers a right, and yet specifically destroys it. This is plainly the consequence flowing from the argument that competition 'however forceful' it may be, cannot produce dissimilarity of circumstance and condition if discrimination and preference is held to necessarily arise from the charging of the lesser rate to the longer-distance competitive point."

"It is not difficult to perceive the origin of the fallacy upon which the contention rests. It is found in blending the 3d and 4th sections in such a manner as necessarily to destroy one by the other, instead of construing them so as to cause them to operate harmoniously. It is a supposed case when, in the first instance, upon an issue as to a violation of the 4th section of the act, it is conceded or established that the rates charged to the shorter-distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer-distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the 3d section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply. The prohibition of the 3d section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act

of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers."

And again, commencing on page 18:

"The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it. We say seemingly on the one hand and apparently on the other, because in the supposed cases the preference is not 'undue' or the discrimination 'unjust.' This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge." * * * "That, as indicated in the previous opinions of this court, there may be cases where the carrier cannot be allowed to avail of the competitive condition because of the public interests and the other provisions of the statute, is of course clear. What particular environment may in every case produce this result cannot be in advance indicated. But the suggestion of an

obvious case is not inappropriate. Take a case where the carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency towards unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places."

In *T. & P. R. Co. v. Interstate Commerce Commission,* 162 U. S. 197, at page 220, the court says:

"The very terms of the statute, that charges must be reasonable, that discrimination must not be unjust, and that preference or advantage to any particular person, firm, corporation, or locality must not be undue or unreasonable, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act."

In view of the *facts* in the case at bar in the light of these decisions and of the language of the act "undue" preferences and "unjust" discriminations cannot be predicated on the charging of a lower rate to the longer distance competitive point, nor is such a discrimination within the condemnation of the law unless

other and real causes of discrimination such as was pointed out by the court exist.

It is not suggested that undue preferences and unjust discrimination under the operation of the section might not be created, which could be corrected by the Commission.

Indeed the court below pointed out acts which it held would be subject to the control of the Commission.

Neither is it intended to be suggested the act is perfect or that amendments may not be made to correct imperfections or to remedy abuses still obtaining.

But this is for Congress and no such duty rests upon the courts.

It would seem to be clear that under the section as amended the carriers must first apply for relief to the Commission; that if the evidence discloses that at the longer distance point there actually exists a competitive condition not created by the act of the carrier, compelling lower rates than to intermediate points, it is the duty of the Commission to relieve the carrier from the rule of the section and allow it to meet such competition, provided the rate is not so low as to burden other traffic or to create undue preferences or unjust discrimination.

That the mere fact of making the lower rate at the distant point is not in itself an undue preference or unjust discrimination is certain.

It is of course understood that at all times rates to the intermediate points and to all points must be just and reasonable.

Given such rates, the intermediate point has no ground for complaint because some longer distance but competitive point enjoys lower rates.

In this case there are no perplexing questions of other undue preferences or unjust discriminations than the difference in the rates. The orders are based, as is shown by the reports, upon the theory that the Commission has the power to fix the relation of the rates between the respective places based on the competitive rates. In other words, to use the language of the Commission:

> "It should ever be borne in mind that the acute complaint in this case is the discrimination and not the unreasonable rate."

The "discrimination" complained of is that Portland, Seattle and Tacoma enjoyed lower rates from eastern territory than Spokane. That "discrimination" is based on water competition. That the competition existed was found as a "fact" by the Commission.

Judge Noyes, in his work on *American Railway Rates* at page 93 thus aptly states the situation:

> "The railroad is not indispensable to the community having the benefit of natural transportation. The locality having water communication will not pay more to the railroad for a service not requiring great speed than the water charges. The traffic will not bear a greater rate. The railroad can only obtain the traffic of such a community by meeting the charges for water transportation, however low they may be. A discrimination

in its favor merely recognizes the discrimination of nature."

THE ORDER NOT ONLY FIXES THE RELATIONSHIP THAT MUST OBTAIN BETWEEN TERMINAL AND INTERMEDIATE RATES UNDER PRESENT CONDITIONS, BUT REQUIRES THIS RELATIONSHIP TO BE MAINTAINED BASED ON "RATES CONTEMPORANEOUSLY IN EFFECT FROM THE SAME POINTS OF ORIGIN TO PACIFIC COAST TERMINALS."

This condition is not only a sufficient justification for setting the order aside, but in itself shows conclusively that "relationship of rates" not "reasonableness" was the object sought to be secured. Furthermore, it precludes appellants from even contending that the mere difference in rates between the competitive and noncompetitive points is not the sole reason on which the unjust discrimination condemned is based.

This effect of the order is to prevent or discourage the carriers from meeting water competition at coast terminals, for they can only do so under penalty of a shrinkage of revenue at all intermediate points.

In the report in cases 1665 and 1796 (Record 883, page 128) the Commission says:

"The coast cities—those that have direct access to the ocean—cannot be materially injured by the policy of the law we have herein considered. They are rendered secure as entrepots of commerce by the presence of the ocean, so long as they choose to avail themselves of its advantages."

What is the "policy of the law" referred to? That the Commission has power to name rates to intermediate points based on a compelled rate to a water point irrespective of their reasonableness and to continue this relation indefinitely? In other words, to penalize the railroad for meeting a water competition, take from coast cities the benefit resulting from their location, and endow intermediate points with advantages they do not possess?

The assurance that coast cities will not be "materially injured" by this policy does not meet the real question. It has been shown that lower competitive rates compelled by causes beyond the control of the carrier are not unjustly discriminatory, but the policy adopted by the Commission does unjustly discriminate against the water point.

The necessary effect on the coast city is to minimize its advantage of location and to equalize commercial conditions.

This it is submitted is beyond the powers granted the Commission.

A community is entitled to every lawful advantage its situation justifies.

While a rail carrier cannot be compelled to meet competition, yet in the nature of things and in response to the operation of economic laws they do and always will meet it so long as there is some profit in so doing.

For the Commission to say, therefore, that competition can only be met at coast terminals, at the sacrifice of larger intermediate revenue, is to say, and it

might as well be said, it cannot be met at all. If the Commission can fix one percentage it can fix another or prohibit any exception.

The necessary result is to deprive the coast city of a perfectly lawful advantage and to transfer such advantages in full or *pro tanto,* to other communities where neither the law nor location justifies it,—in other words, through rate relations to equalize commercial advantages.

IT IS IMPROPER AND NOT FEASIBLE TO BASE RATES FOR THE FUTURE TO INTERMEDIATE POINTS ON RATES TO WATER COMPETITIVE POINTS ON ACCOUNT OF CONSTANT FLUCTUATIONS AND CHANGING CONDITIONS AT SUCH POINTS.

Assuming the Commission has authority to fix a relationship between the water compelled and intermediate rates, and that at the time such relationship as fixed is justified, what power exists to continue such relationship based on rates "contemporaneously in effect at coast terminals" and how can any one know such relationship would be fair or justifiable?

The shifting character of ocean service and rates is generally understood. It depends on many factors. The service rendered and facilities found at the terminal have much to do with the water rate. A community may deepen its harbor, increase its facilities and decrease cost or charters may fall, all of which would be reflected in the rate, yet under the order, if the rail carrier met the competition in any greater degree than

at the date of the order, automatically every rate to intermediate points taking a higher rate than the terminal rate would also be reduced.

The inevitable result is plain, either an advance of rates to coast terminals by the rail carriers taking such business as they could (which would also tend to advance rates on other traffic) or a reduction of rates at the terminal with a like reduction intermediate.

As the court below said in speaking of the order:

> "It is not based upon the current coast rates. It determines the relation of the short haul rates to *any* coast rates that might be established." (Record 883, page 345).

And again:

> "But neither the equality of rates on shipments from zone 1 nor the relation between the rates on shipments from the other zones, as fixed in the order of the commission, can be sustained upon any such considerations. In so far as the commission attempts thus to determine the relation of the long-and-short-haul rates, irrespective of the absolute rates, it goes beyond any authority that has been vested in it, for it is not in the power of the commission to say that 100 per cent, 107 per cent, or any given percentage of an unknown less than reasonable rate to the coast is necessarily a maximum reasonable and nondiscriminatory rate from the same point of origin to an interior point." (Record 883, page 346.)

EQUALIZATION OF COMMERCIAL ADVANTAGES.

No time need be spent in discussing the self evident proposition that the Commission has not the power to equalize commercial advantages. Indeed the Commission has over and over again disclaimed either the right or desire to exercise such power.

The efforts of carriers in their supposed interests or in the interests of some locality to equalize natural disadvantages through the rate making power has time and again been condemned by the Commission.

In *Elk Cement & Lime Co. v. B. & O. R. R. Co.*, 22 I. C. C. Rep. 84, at page 88, the Commission says:

> "Carriers are not required by law, and could not in justice be required, to equalize natural advantages, such as location, cost and production and the like, but they may not in any manner whatsoever unduly prefer one set of shippers entitled to equal treatment over another, or one locality over another."

In *Carstens Packing Co. v. O. & W. R. R. Co.*, 22 I. C. C. Rep. 77, at page 81, the Commission says:

> "From the whole record in this case the conclusion is inevitable that complainant is seeking to have the Commission equalize Tacoma and Seattle with Portland as a slaughtering center. Doubtless due to her natural location Portland has certain advantages as a livestock market, and the testimony is that the prevailing prices of livestock are somewhat lower there than at the cities on the Sound. The record does not show that this condition is due to any unjust arrangement of

rates, and it is well settled that it is not the function of the Commission to equalize communities in matters of this character."

Section 843 of *Beale & Wyman on Railroad Rate Regulation* contains a succinct statement of the law supported by abundant authority.

"It has sometimes been urged that a carrier should so arrange its rates as to bring about some desirable commercial result, either by equalizing commercial advantages between two localities or by otherwise affecting natural conditions. But this theory is dangerous. The carrier's rates may seldom be regulated with such an object in view. As was said in *Brewer v. Central of Georgia Railway* (84 Fed. Rep. 258, 268): 'Shall government undertake the impossible, but injurious, task of making the commercial advantages of one place equal to those of another? It might as well attempt to equalize the intellectual powers of its people. There should be no attempt to deprive a community of its natural advantages, or those legitimate rewards which flow from large investments, business industries, and competing systems of transportation to facilitate and increase commerce.'

"This view has constantly been held and enforced by the Interstate Commerce Commission, as well as by the courts. 'It is not the duty of carriers, nor is it proper, that they undertake by adjustment of rates or otherwise to impair or neutralize the natural commercial advantages resulting from location or other favorable condition of one territory in order to put another territory on an equal footing with it in a common market. Each locality competing with others in a common market is entitled to reasonable and just

rates at the hands of the carriers serving it and to the benefit of all its natural advantages. If this result in prejudice to one and advantage to another, it is not the undue prejudice or advantage forbidden by the statute, but flows naturally from conditions *beyond the legitimate sphere of legal or other regulation.'*"

In *Enterprise Mfg. Co. et al., v. Georgia R. R. Co. et al.,* 12 I. C. C. Rep. 451, at page 456, the Commission says:

> "It is not the province of the Commission to equalize by rate adjustments natural conditions, or to destroy legitimate commercial advantages enjoyed by one section or locality."

In two recent cases the Commission has again announced its position on this question. In *East St. Louis C. O. Co. v. St. L. & S. F. R. R. Co.,* 20 I. C. C. Rep. 37, 41, it said:

> "Respecting both of these contentions it is not the duty of this Commission to equalize the profit and loss results of competing operations in different localities by overcoming natural and commercial conditions with rate adjustments."

And again in *Corp. Com. North Carolina v. N. & W. Ry. Co.,* 19 I. C. C. Rep. 303, 309:

> "Every city is entitled to the advantage of its location and may not lawfully be subjected to high freight charges merely because carriers, for reasons of convenience or otherwise, include it with a number of other points in surrounding territory, which latter points are not similarly situated."

While it may be intermediate territory is entitled to relief, this relief it would seem could be secured by the establishment of just and reasonable rates, and not by basing rates to that territory on those applying to coast terminals, for under the order irrespective of its purpose the effect is certainly to deprive the coast communities of legitimate commercial advantages.

If on the other hand the intermediate points affected by the order are within the radius of water competition, then their rates can never exceed the terminal rate plus the local back, a perfectly obvious and natural way of an interior point securing the benefit of water competition, a point that will next be discussed.

TERMINAL RATE PLUS THE LOCAL BACK CONTROLS THE RATE WHICH CAN BE CHARGED TO AN INTERMEDIATE POINT WITHIN THE INFLUENCE OF WATER COMPETITION.

This basis of making rates from points of origin on the Atlantic seaboard to interior points has been the subject of many attacks and much criticism, but it is difficult to see why, both economically and from a transportation standpoint, it is not sound.

Absolute rates are not now under discussion nor are they provided by the order. It is a principle, not a particular rate, that is under review. Furthermore, this principle is directly applicable to the facts in this case, and those facts will well serve to illustrate the proposition.

Rail rates, under the law, must be just and reasonable. Undue preferences and unjust discrimination

are forbidden. This rule fixes the measure of the rate the rail carrier is entitled to charge. It may charge less, but it cannot charge more.

The city of Spokane is situated about three hundred fifty miles from Seattle; Baker about a like distance from Portland, while Walla Walla, La Grande and Pendleton are much nearer; Pendleton being but 231 miles distant from Portland.

The cities mentioned are those complaining in the Spokane case. It, therefore, appears that each of them is within the radius of water competition and their rates from Eastern territory are affected by it. These and other facts to which the court's attention will be directed, are of importance in considering the effect and validity of the order.

By an order made February 9, 1909, class rates were prescribed from Chicago and St. Paul to Spokane, which rates are now in effect. The order in question in this case affects commodity rates only. It appears from the report of the Commission (15 I. C. C. Rep. 376-383) that at the time of the first hearing, Spokane had six hundred thirty-six commodity rates from St. Paul, of which four hundred and seven applied east of Chicago, but all did not extend to New York. At page 380 in speaking of the movement of traffic to the coast cities and Spokane, the Commission said:

> "Only a comparatively small part of Spokane's traffic, however, moves upon the class rate. The great bulk of the tonnage from Eastern points of origin to Spokane moves upon com-

modity rates, and this is even more true of the Pacific Coast."

It further appears that in the large majority of cases the rates to Spokane from Eastern territories are not as great as the cost terminal rates plus the local back. As to this at page 382 of the report cited it is said:

> "The complainant states in its complaint that these commodity rates to Spokane are made by adding to the Seattle rate the full local rate from Seattle to Spokane. This is not correct. In some instances the Spokane rate is constructed in that manner, and it was said in testimony that these items embraced 14 per cent of the whole in number. In other instances the Spokane commodity rate is the same as the Seattle rate, and the testimony shows that this is true of about 16 per cent of the different items in number. With the great bulk of the commodities the Spokane rate exceeds materially the Seattle rate, but not by the full local back. It was said that the Spokane rate was higher than the Seattle by about seventy per cent of the local from Seattle to Spokane in the majority of cases."

In the report before the court on the same subject (Record 883, page 178) the following statement is made :

> "Rates to interior points are usually constructed by adding the local rate from the terminal to the interior. This is not so in all cases. It was said, for example, that rates from the East to Spokane were higher than the Coast rate by about seventy-five per cent of the local back. In all cases, however, the rate from all this blan-

keted territory to the interior points is very much higher than to the more distant coast point."

Indeed an examination of the rates as set out in the reports before the court shows beyond question that water competition at the coast terminals was the controlling fact that determined the naming of commodity rates to Spokane by the railroads in order to hold the traffic to the rails for the long haul. The Commission found this to be the fact. The following quotation is from 15 I. C. C. Rep. 390:

> "We have seen that in 1900 the American-Hawaiian Steamship Company put into service a line of steamers via the Straits of Magellan and by the year 1902 this Company had extended its operations as far north as Tacoma and Seattle. Traffic had also begun to move to some extent via this line and these Sound ports to Spokane. *For the purpose of meeting this competition the defendants put into effect about 1902 certain additional commodity rates to Spokane, but the general situation was not changed.*" (Italics ours.)

Other causes explained in the report led to further changes in the rates to Spokane, and the railroads accorded to Spokane certain defined territory (15 I. C. C. Rep. 391).

As has been stated the interveners represent cities situated on the sea board, having direct steamship service with the Atlantic seaboard. It is a recognized fact that commodities generally can be carried profitably at lower rates by water than by rail. This is peculiarly the case in deep sea movement.

Assuming a normal water rate, then the maximum rate on any commodity to any interior point within the radius of water competition, and subject to such competition from Eastern points of origin, will, and must necessarily, always be the water rate to the coast point plus the local back, and the nearer the interior point to the coast, necessarily the lower the through rate as compared with points further removed from water.

Therefore to prevent any discrimination under such circumstances all that is required is to fix just and reasonable rates to interior points in both directions, that is, from Eastern points of origin and from coast terminals back. By this method the interior point receives what the law says it is entitled to,—"Just and reasonable rates" and in addition everything in the nature of competition, which by reason of its location it is entitled to.

Thus, to Spokane, had the Commission fixed just and reasonable rates from New York and other Eastern territory, and just and reasonable rates had been fixed from Seattle, Tacoma and Portland to Spokane, why and where would there be the discrimination the law forbids ?

In the Commission's report to Congress quoted in the brief for the Commission (page 40, brief) it appears the Commission recognized the applicability of this system of rate making from New York and in discussing the theories under which the transcontinental situation can be disposed of, says:

"1. Carriers may meet between New York and San Francisco the water rate. They may then apply from and to interior points whatever rate is thus named plus the local charge to or from the interior point.

This would meet the situation from a strictly transportation standpoint and, from that standpoint, would be unexceptionable.

If carriers had always applied or should now apply that system of rate making to the transcontinental situation, they might probably be safely left to name whatever rate they saw fit from New York to San Francisco as a water-competitive rate. The Commission would prevent discriminatory and unreasonable charges if it confined itself to the absolute rate at interior points."

The rate to the coast point is made by the rail carrier to meet the water competition found there and not found at Spokane, and this rate it has the right to make, and no unjust discrimination as against Spokane can arise therefrom. The competitive condition at the coast terminals was recognized by the Commission, and it authorized a higher charge by twenty-five per cent from New York to all of the complaining interior cities than to the coast terminals. Why twenty-five per cent, or any per cent? On what basis was the percentage arrived at? It applies upon every commodity, regardless of its nature, and without any consideration as to its being more or less susceptible to water competition.

If no competition by water exists, if the rates to the Coast cities are remunerative, then no lower rate

to those cities than to any interior point east thereof is justified from eastern territory.

If there *is* competition, and *that there is is found by the Commission to be a fact,* then no unjust discrimination can result, unless the competitive rail rates are non-compensatory. By simply enforcing the provision of the act that all rates must be just and reasonable the Coast terminals would not be deprived of their lawful advantages and the interior cities would secure all the relief to which they are entitled or the law recognizes.

It is not being attempted to determine the point where the effect of water competition by using the rate back would run out, but interveners are endeavoring only to show the operation of the rule to points within its radius. Wherever a just and reasonable rail rate to an intermediate point is less than the rate to the Coast terminals plus the local back, the rule ceases to eperate, as to that point, far or near,—the rule is inflexible. This rule and its operation have been approved by this court. In *Interstate Commerce Commission v. Louisville and N. R. Co.,* 190 U. S. 273, at page 280, the court says:

> "The record convinces us that the appellate court correctly decided that there was no legal foundation for the contention that the 3rd and 4th sections of the Act to regulate commerce had been violated. It was and is conceded that the rates on through freight from New Orleans to Atlanta were the result of competition at Atlanta, and that there was, hence, such a dissimilarity of circumstances and conditions as justified the lesser charge for the carriage of freight from

New Orleans to Atlanta, the longer distance point, than was exacted for the haul from New Orleans to La Grange, the shorter distance point.

The sum of the rate to La Grange was arrived at by charging the low rate produced by competition at Atlanta, and adding thereto the sum of the local rate back from Atlanta to La Grange. The same rule was applied to the stations between La Grange and Atlanta, each of those stations receiving, therefore, a somewhat lower rate than La Grange, although they were located a greater distance from New Orleans and nearer Atlanta. The sum by which the rates from New Orleans to these respective stations between La Grange and Atlanta were lower than the La Grange rate, was dependent upon the distance these respective stations were from Atlanta. It was shown, however, and is unquestioned, that, except in a particular to which we shall have occasion hereafter to refer, if the charge had been based on the nearest competitive point south of La Grange,—that is, Montgomery,—and there had been added to the competitive rate to Montgomery the local rate from Montgomery to La Grange and the other stations beyond, the freight rates on shipments from New Orleans to La Grange would have been much greater than the rates now complained of as excessive. In other words, the railroads, instead of putting out of view the competition prevailing at Atlanta, when they fixed the rates to the non-competitive points, took the low rates prevailing at Atlanta as a basis, and added thereto the local rate from Atlanta, the result being that the places in question were given the advantage resulting from their proximity to Atlanta, the competitive point, in proportion to the degree of such proximity.

> When the situation just stated is comprehended, it results that the complaint in effect was that a method of rate making had been resorted to which gave the places referred to a lower rate than they otherwise would have enjoyed. In this situation of affairs, we fail to see how there was any just cause of complaint. Clearly, if, disregarding the competition at Atlanta, the higher rate had been established from New Orleans to the non-competitive points within the designated radius from Atlanta, the inevitable result would have been to cause the traffic to move from New Orleans to the competitive point (Atlanta), and thence to the places in question, thus bringing about the same rates now complained of."

In discussing the holding of the Commission that the rates to La Grange were unreasonable *per se,* the court said:

> "We think it clearly results that every conclusion reached by the Commission concerning the unreasonableness *per se* of the rates to La Grange rested wholly upon the error of law committed by the Commission when it decided that the railroad companies were powerless to consider the competitive rates prevailing at Atlanta, and to use those rates as a basis for the charges to points within the competitive area in order thereby to give a lower rate to such points than they otherwise would have enjoyed. Thus, it was held in effect that, because the competitive rate to Atlanta was not unduly low, therefore any higher charge to La Grange, the shorter distance, was unreasonable. And the same misconception was manifested by the reasoning adopted concerning the rates to Hogansville and the other stations between La Grange and Atlanta, since it was held that, because the charges to these points were

lower than to La Grange, therefore the rates to the last named point were unreasonable *per se*. Both of these conclusions, however, but held that if the carriers elected to meet the competitive rate at Atlanta they must at once correspondingly reduce their rates to all shorter distance and non-competitive points. But such a ruling was equivalent to overthrowing the settled construction of the Interstate Commerce Act allowing carriers to charge the lesser rate for the longer than for the shorter distance, if at the further point the lesser rate was justified by a substantial dissimilarity of circumstances and conditions there prevailing, consequent upon real competition. A clause in the order of the Commission makes it clear that no independent finding as to the unreasonableness of the rates was made, since it allows the carriers to continue to charge the rates complained of to La Grange, provided no higher rates were charged to the more distant points between there and Atlanta. The inconsistency between such an order and the conclusion that the rates to the shorter distance point were unreasonable *per se* was pointed out in *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1; 45 L. ed. 719; 21 Sup. Ct. Rep. 516, where it was said (p. 23, L. ed., p. 727, Sup. Ct. Rep. p. 524):

'A decree which ordered the carriers to desist from charging a greater compensation for the lesser than for the longer haul would be in no way responsive to the conclusion that the rate for the lesser distance was unreasonable in and of itself. Such a decree would in effect authorize the carrier to continue to charge at its election a rate which was in itself unreasonable to the shorter point.' "

MEANING OF THE WORD "EXTENT" IN THE ACT.

The carriers made application to the Commission for relief from the operation of the section as required by law. The Commission found the facts justified relief from Zones 2, 3 and 4, therefore there need be no discussion as to whether the facts make out a "special" case within the meaning of the law. The "special" case exists. Under these circumstances, what is the duty of the Commission under the law? It is submitted, given the facts establishing a "special case," it has no discretion, but must act and relieve the carriers from the operation of the section, otherwise its failure so to do would defeat the purpose of the law as expressed. Any other course would nullify the section and would leave it a mere matter of grace with the Commission whether the exception should be granted. The language of the law is as follows:

> "That upon application to the Interstate Commerce Commission, such common carrier may in *special cases*, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the *extent* to which such designated common carrier may be relieved from the operation of this section," etc.

There can be no question but that Congress intended to enact a statute under which if conditions justified, carriers should be relieved from the operation of the section.

It would seem the question to be determined is the same as under the original section and with the same qualifications, except that under the amended Act the carriers now do not have the initiative but must submit the question in the first instance to the Commission. The discussions in Congress, the language of the Act, the necessities of commerce all show beyond question that not the law, but its administration is the essence of the change.

The principle that a rate made lower for a longer than the shorter haul when compelled by substantial competition, is not unduly preferential or unjustly discriminatory has been approved by the highest authority. Indeed, it may be said without fear of contradiction, that all authorities, professional or lay, agree, as an economic principle, rail carriers must within certain limits meet and be permitted to meet competition where it exists, that it is in the public interest, and that any other policy would tend to deprive localities of their natural advantages, restrict commercial enterprises, arrest development, and limit the rightful use of a necessary transportation agency.

In view of the wording of the Act, and the interpretation which has been recognized and acted on for years, there should be no great difficulty in determining the meaning of the word "extent" or the power of the Commission thereunder. Under the original Act in meeting competition the carrier had the right to meet it, providing in doing so it did not violate other provisions of the Act, but the mere fact that if conditions justified, a lower rate was made for the longer

distance was not in itself in contravention of the Act.

It would seem if the Commission is to determine the "extent" the carriers are to be relieved, there must be some standard to measure by. The Commission is seeking to prevent unjust discriminations within the meaning of the law.

Under the first section all localities are entitled to just and reasonable rates. Therefore, if the shorter distance point enjoys just and reasonable rates, the discrimination, if any, lies in the fact of the lower rate prevailing at the longer distance. If competition justifies this, under certain conditions, this rate is just and reasonable.

In measuring the extent to which the Commission may relieve the carrier, there can be no justification or authority for the rule adopted in this case. It is well to bear in mind exactly what the order requires and the bases used. The rates at the terminal points authorized to be charged by the carriers were not fixed or determined, nor were reasonable or any other rates fixed or determined to be charged at interior points.

Indeed it appears from the reports of the Commission in these cases that under the authority of the amended Act, as construed by it, the Commission is not required to fix a schedule of reasonable rates, but has authority to, and did attempt to fix the relationship which should exist between the interior rate and *any* competitive rate obtaining at the coast terminals. The Commission recognized that competition in a greater or less degree exists at the terminals. It de-

termined that rates from Zone 1 to the interior points named in the order could not exceed rates "contemporaneously in effect to Pacific Coast terminals," and from Zones 2, 3 and 4 rates to the interior points named in the order could exceed the Coast terminal rates by certain percentages named.

The order applied to the entire schedule of commodity rates, consisting of thousands of different commodities, subject to entirely different transportation conditions and competitive influences. Therefore, not only is no standard of any kind used, but the order automatically reduces or advances rates at interior points with the changing conditions at the Pacific coast terminals. In other words, regardless of conditions changed or otherwise, under the order it will be unduly preferential and unjustly discriminatory for the carriers to vary from the relation fixed. Apparently no consideration was given to the last paragraph of the section reading as follows: "Whenever a carrier by rail shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

This paragraph but emphasizes the fact that Congress did not intend to prevent rail carriers from competing with water carriers, but did intend to discourage the *elimination* of water competition by destruct-

ive rates. Even with this intention, apparently the carrier is not forbidden from making such rates, but a penalty is provided for so doing by requiring their maintenance under the conditions stated. It is an attempt although of doubtful efficacy to correct an evil long recognized of unrestricted and destructive competition.

However, it distinctly negatives any theory that the rail carrier is not to be permitted to compete with the water carrier. But if competition recognized by the law is to be permitted only on condition that revenue on a large intermediate business must be sacrificed, although such revenue is derived from just and reasonable rates, it does not require any prophetic instinct to predict the result of such a policy at the competitive points. Inevitably the carrier will go out of the competitive business, increasing its rates on other traffic to compensate for the loss of terminal business, and the net result will be to deprive the competitive points of a perfectly natural and lawful condition, and to advance the rates to the interior points and on other traffic. Practically no other result can possibly follow. Water competition is not only a varying factor, but differs in degree on various commodities. It is known that some commodities are very much more subject to water competitive influences than are others. The rail carrier cannot now, no more than under the original Act, or in common justice under any law, transport freight to competitive points below cost and make up the deficiency in excessive rates on other traffic or at non-competitive

points. Other instances heretofore referred to and set out in the opinion of the court below would be unjust discrimination and subject to correction. No one would venture to name in advance all the acts that would constitute undue preferences or unjust discriminations, but the mere naming of a lower rate from the longer distance point to the shorter, when compelled by competition, is neither unduly preferential nor unjustly discriminatory. Under the law a rate will not be permitted below cost. On the other hand unjust and unreasonable rates are also forbidden. How far below a just and reasonable rate the carrier may go is for the Commission to say.

When this is done the extent to which the carrier may be relieved is definite and certain and the differential between the water competitive rate as allowed by the Commission and the reasonable rate at a point not so affected, is simply a matter of subtraction. This necessarily includes the extension of the territorial area affected, for the nearer the interior point to water the more it is affected thereby and while the competitive rates back would generally determine the rate at such points, yet there is no reason why the carriers should not apply for relief to any point affected by water competition.

In the brief filed in behalf of the Commission an excerpt is set out taken from the Commission's twenty-fifth annual report to Congress, dated December 20, 1911.

At page 29 of the brief will be found the following statement:

> "In what way can the Commission give effect to its conclusions? It cannot fix a rate from New York to San Francisco below which the rail line cannot go, for it has no authority to fix a minimum rate,"

and it is then argued there is no way to prevent discrimination except by establishing a differential between the rate at the distant and the near point,—in other words by fixing the relationship of rates.

It is believed the Commission is in error in thus stating the limits of its authority.

It unquestionably has the power to prevent a rate less than the fair cost of service and in the report in this case (Record 883, page 173) it distinctly affirmed the very authority disclaimed. It said, speaking of its powers under the fourth section:

> "This authority can be exercised by prescribing the maximum difference which may be made against the intermediate point, or *by fixing a rate at the more distant point below which the carrier must not go,* or by defining the territory from which the higher intermediate charge may be made."

The question has been discussed from the standpoint of water competition, as that is the factor involved in this case, and it more often arises by reason of that circumstance than any other. It is, however, apparent that there are other forms of competition which might justify the application of the rule and granting relief from the operation of this section. The court below in passing upon the point under discussion said:

"But the order of the Commission as to this territory is not limited to a denial of the applications in the form in which they were presented, that is, to a denial of the maintenance of the then prevailing rates to the coast concurrently with higher rates to the interior points. It forbids the carrier to maintain any coast rate lower than the contemporaneous intermediate rate from these points. In other words, if the carrier from St. Paul in order to meet new water competition from New York should reduce the St. Paul-Seattle rate to a point less than at present and less than a rate reasonable *per se*, but nevertheless somewhat remunerative, it would be compelled, under this order, to grant the same rate to the interior point, even though, under these circumstances, a reasonable rate to the interior point higher than the unreasonably low rate to the coast point forced upon the carrier by such market competition under penalty of losing the business would not be in violation of section 1 or of any other provision of the act.

This likewise is true of the order as to rates from the other zones. It is not based upon the current coast rates. It determines the relation of the short-haul rates to *any* coast rates that might be established by the carriers. It makes illegal a rate from Chicago to Spokane more than 7 per cent higher than an unreasonably low but remunerative Chicago-Seattle rate forced by competition, even though the Chicago-Spokane rate be reasonable *per se* and not in violation of any provision of the act.

Is the Commission empowered to make such an order? It is urged that even if it must grant an application for relief, when the lower long-haul rate involves no violation of the act, nevertheless it may determine the extent of the exemption, and therefore it may fix the relation of rates.

But to sustain the constitutionality of the proviso in section 4 it must be read as imposing the duty on the Commission not only to grant exemption from the hard and fast rule when thereby no section of the act is violated, but also to grant such exemption to the extent that no section of the act is thereby violated; that is, the carrier is entitled under the act to be granted authority to charge as much less as it please for the long haul than for the short haul, provided the Commission shall first determine that it does not thereby violate any other provision of the law. In granting authority to make an absolute long-haul rate lower than some short-haul rate, the Commission would have the power and the duty to prevent a violation of section 1, and by virtue of its authority to determine reasonable rates, to fix the short-haul rate.

Doubtless the Commission could, moreover, in order to prevent a violation of section 3, make relative rates in so far as this might be necessary to prevent an undue preference. For while, under the decision in *E. T., etc. Ry. Co. v. I. C. C., supra,* undue preference could not be predicated merely on the fact that the rate was less for the long than for the short haul, when the former was forced by water, market or any kind of competition, it might be predicated thereon if the short-haul rate were not likewise based upon the same competition in so far as and to the extent that it ought fairly to be influenced thereby. For example, if the St. Paul-Seattle rate be made less than reasonable although remunerative to meet the forced New York-Seattle rate so as to enable St. Paul to compete with New York in the Seattle market, Spokane might complain of unreasonable prejudice against it if the St. Paul-Spokane rate were made higher than the New York-Spokane rate and thereby similar competition were

prevented at Spokane. So, too, as its merchants could get their supplies through Seattle at a price based on the New York-Seattle freight rate plus the back-haul rate, Spokane might have grounds for complaint of undue prejudice if the rate either from St. Paul or New York to Spokane were made higher than the rate from such point to Seattle, plus the back haul, because only to the extent of the back-haul cost could Spokane be said to be in any different position than Seattle, and therefore only to that extent could it justly be deprived of the benefits of the same competitive forces which determine the Seattle rate.

But neither the equality of rates on shipments from Zone 1 nor the relation between the rates on shipments from the other zones, as fixed in the order of the Commission, can be sustained upon any such considerations. In so far as the Commission attempts thus to determine the relation of the long and short haul rates, irrespective of absolute rates, it goes beyond any authority that has been vested in it, for it is not in the power of the Commission to say that 100 per cent, 107 per cent, or any given percentage of an unknown less than reasonable rate to the coast is necessarily a maximum reasonable and non-discriminatory rate from the same point of origin to an interior point."

COAST TERMINALS NOT UNDULY FAVORED.

This case is being submitted by the interveners on the facts as found by the Commission and appearing in the record. There is no wish or desire on their part to prevent the establishment of just, reasonable and non-discriminatory rates to any community. They appear solely in defense of what they conceive to be their rights arising out of advantages of location, which

they feel they will be deprived of to a greater or less degree by the order in this case. They appreciate the fact that the law is imperfect and that amendments will be required to further the purposes for which the Act was enacted.

While there are general statements appearing in the reports in this case and in the report to Congress set out in the brief filed on behalf of the Commission in this case, from which it might be inferred or understood that the railroads were and are unduly favoring the coast cities and purposely discriminating against the interior points, it is rather difficult to understand why this should be the case or their motive in so doing, and why they should desire to develop competitive traffic and arrest the development of non-competitive traffic. That this idea was also in the minds of the Commission appears from the report in Record 883 at page 187:

> "To a disinterested observer it would seem to be in the true interest of these transcontinental lines, which begin at the Missouri River, to make rates which would build up interior points as against the coast. To haul to these points is shorter and less expensive. The distribution from these points is easier, but, above all, the traffic which is created at such a point *belongs* to the *rail line* which creates it, while the traffic which is *fostered upon the coast is the prey of every vessel which sails the sea.* Carriers in the future will doubtless adopt this method and will voluntarily make rates to interior points like Spokane which will enable those localities to compete with coast cities." (Italics ours.)

Notwithstanding statements which appear to the contrary it is the belief of the interveners that this policy which seems to the Commission so natural and in the interest of the transcontinental lines to adopt, is and has been their policy for years. The evidence of this, to some extent, appears in the reports. Certainly in the case of Spokane, which is now under consideration, it could hardly be claimed that the transcontinental lines have discriminated against it.

In the report of the case at bar will be found this statement (Record 883, page 186):

> "Spokane is a great distributing center, and aims to be a greater one."

Yet but a few years ago this city was non-existent. And again, referring to Record 883, page 174:

> "Spokane is located about 400 miles east of the Pacific Ocean in the midst of a region rich in agricultural and mineral resources. Between it and the coast lies the Cascade Range of mountains. Spokane is the principal city in Washington east of these mountains, and aims to distribute to the territory which surrounds it, in which attempt it meets severe competition from Seattle, Tacoma and Portland."

In 15 I. C. C. Rep. at page 391, speaking of the rates enjoyed by Spokane, after referring to a "boycott" instituted against the Northern roads by the jobbers of that city, the report says: "The result was a conference between the railways and the jobbing interests at Spokane, at which coast jobbers were

also represented, the outcome being an understanding that Spokane was to be accorded a certain defined territory.

It was said upon this hearing that this territory was turned over to the Spokane jobbers by reducing the distributing rates from Spokane which were declared to be very much lower than corresponding distributing rates from coast towns. Whether those rates are or are not more favorable to Spokane, we have not considered, but it seems certain that no change was made in these rates at this time. The purpose was effected by according to Spokane certain carload commodity rates from eastern points of supply. The railroads inquired where the various jobbers obtained their supplies, and put into effect such rates from those points as would, in comparison with rates to terminal points, enable Spokane to undersell the terminal jobbers. Previous to this time the commodity rates accorded to Spokane had been few in number. They were now very much increased. The conceded effect was to pass over to the jobber of Spokane a territory about 100 miles in extent to the east and to the south, including the Palouse country upon the north of the Snake River.

While, therefore, Spokane rests under rate disabilities and discriminations stated in the opening of this report, it enjoys, in so far as it can under that scheme of rate making, exceptional freight rates. Spokane is probably more favored in this respect than any other interior jobbing point."

As has heretofore been pointed out the facts as found show from the opening of the transcontinental railroads, a persistent and continuous effort on their part has been maintained to destroy water competition, the very citadel of the coast defense. Water is, and always has been, the Pacific coast's birthright, and at no time since the date of the completion of the first transcontinental railway has this influence been so potent as today. Under the facts to suggest that the Pacific coast cities have their present rates by the grace of and through the favor of the railroads is negatived by every motive that ordinarily prompts human action. It is difficult to see why the transcontinental lines would foster traffic upon the coast which "is the prey of every vessel which sails the sea," and it is perfectly safe to say that they have not done so, excepting under the most compelling reasons.

QUESTION TO BE DECIDED ONE OF LAW.

However, the question before the court is one of law—the interpretation of a statute. There can be no serious dispute as to the facts. Does the amended section confer the power upon the Commission claimed by it? If so, the order might be sustained; if not the decree of the court below will be affirmed. There appears to be no difference of opinion as to the construction of the original act. At page 155, Record 883, the Commission says:

> "The defendants insisted that terminal rates were induced by water competition, that therefore the circumstances and conditions under

which rates to Spokane were made differed from those obtaining at Seattle, and that for this reason the fourth section did not apply. The Commission found as a fact that there was water competition at Pacific Coast terminals which influenced the rate from eastern territory, and held that in view of this fact the terminal competitive rate could not be used as a standard by which to measure the reasonableness of the intermediate rate to Spokane. It therefore decided that there was no violation of the third and fourth sections, and declined to make any order upon that ground. The opinion was expressed that under the decisions of the Supreme Court of the United States the duty of the Commission was simply to establish reasonable rates to Spokane, allowing the carriers to make such rates to the more distant competitive points as they might elect, so long as those rates were not less than the fair cost of the service and did not, therefore, impose a burden upon other kinds of traffic."

Under the amended Act they thus interpret their powers. Record 883, page 172:

"The section today in its practical application is entirely different, and the questions presented for consideration are different. We are considering now not merely whether circumstances at the two points are dissimilar, but whether on the whole, that dissimilarity justifies a departure from the rule of the section."

Again at page 173:

"Congress has evidently had it in mind at all times that cases might arise where carriers should properly be permitted to charge a lower rate at the more distant point, and has intended to arm the Commission with authority to do justice in

such instances by permitting a deviation from the rule of the section and prescribing the amount of that deviation. The authority can be exercised by prescribing the maximum difference which may be made against the intermediate point or by fixing a rate at the more distant point below which the carrier must not go, or by defining the territory from which the higher intermediate charge may be made.

"We hold that under the amended section it is the duty of the Commission to investigate each application made by common carrier for leave to depart from the rule of the section. If we are of the opinion, upon a view of the entire situation, that to grant the application will not result in unjust or discriminatory rates and practices, then it should be granted; otherwise it should be denied; and the Commission may, if in its opinion an unlimited departure from the rule of the section ought not to be granted but that a limited departure should be, prescribe in any way that is definite and certain the extent to which the departure may be made. So interpreting the section, we proceed to inquire whether the relief to which the complainants are, in the opinion of the Commission, entitled can in either of the above cases be secured by an order under the fourth section upon the applications of the carriers for relief under that section or in the cases themselves."

The interveners on the other hand do not agree with the Commission as to its interpretation of this section, and its powers thereunder, the reason therefor and the extent thereof having heretofore been discussed.

CONCLUSION

The question involved in this case is not limited to the transcontinental situation. This country has many and varied interests covering the vast extent of territory. It has long coast lines with many harbors, with navigable rivers reaching in some instances far into the interior, emptying into them. It has the greatest inland body of navigable water in the world. It has thousands of miles of navigable waterways.

On these coasts, lakes and rivers, great cities have been established, large investments made and business industries of all kinds brought into being. They were located at such points because of natural advantages and became great centers by the operation of natural laws. The well being of millions of people and the security and continued prosperity of countless industries are based on transportation conditions which were not only potent factors in their original establishment, but which by reason of their location have been the direct cause of their continued growth.

The Act to regulate commerce was never passed for the purpose of depriving any community of its natural advantages "or those legitimate rewards which flow from large investments, business industries and competing systems of transportation to facilitate and increase commerce." The railroads in the first instance were located to secure the established business and at the present time are generally located for such purpose. Thus in a perfectly natural and necessary manner the present system of railways has been developed.

It is inconceivable that Congress could or would enact legislation, the necessary effect of which would be to revolutionize and possibly destroy (certainly seriously affect) the commerce of entire communities without serving the public welfare in the remotest degree.

There are many states and much territory in this great country as vitally concerned in this legislation as are the intermountain states.

What wrong is done any intermediate point or community provided the rates are reasonable (and non-discriminatory) if the railroad meets or partially meets water competition at the competitive point, providing that rate pays some profit over cost of operation? If such water rate pays a profit, to the extent it is made, it tends to a reduction of all other rates. In other words, it is an aid and not a burden on other traffic.

No harm can be done any interior point under the construction of the section advanced in this brief. Every community would secure just, reasonable and non-discriminatory rates, and every advantage which its natural location entitles it to.

It is respectfully submitted that the decree of the court below should be affirmed.

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WIRT MINOR,
Solicitors for Interveners,
Portland Chamber of Commerce,
Transportation Bureau of Seattle Chamber of Commerce, and
Transportation Bureau of Tacoma Commercial Club.

136 70

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~~Nos. 180, 513, 184, 514.~~

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

UNITED STATES OF AMERICA

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND SIXTEEN OTHER RAILROAD COMPANIES.

UNITED STATES OF AMERICA

v.

UNION PACIFIC RAILROAD COMPANY AND TEN OTHER RAILROAD COMPANIES.

INTERMOUNTAIN RATE CASES.

APPEALS FROM THE COMMERCE COURT.

BRIEF AND ARGUMENT ON BEHALF OF THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1912

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

UNITED STATES OF AMERICA *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY Company and sixteen other railroad companies.	No. 480. No. 513.
UNITED STATES OF AMERICA *v.* UNION PACIFIC RAILROAD COMPANY AND ten other railroad companies.	No. 481. No. 514.

INTERMOUNTAIN RATE CASES.

APPEALS FROM THE COMMERCE COURT.

BRIEF AND ARGUMENT ON BEHALF OF THE UNITED STATES.

STATUTES.

These cases involve the validity and construction of section 4 of the act to regulate interstate commerce of February 4, 1887, as amended by the act of June 18, 1910. (Ch. 309, 36 Stat., 547.)

The section as originally enacted and as amended, with the omissions in the original section and additions in the section as amended italicized, is as follows:

SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, *under substantially similar circumstances and conditions,* for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge *and* receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the commission *appointed under the provisions of this act,* such common carrier may, in special cases, after investigation *by the commission,* be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to

SEC. 4. (*As amended June 18, 1910.*) That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, for a shorter than for a longer distance over the same line or *route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act;* but this shall not be construed as authorizing any common carrier within the terms of this act to charge *or* receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the *Interstate Commerce* Commission such common carrier may in special cases, after investigation, be authorized *by the commission* to charge less for longer than for shorter distances for the transporta-

which such designated common carrier may be relieved from the operation of this section *of this act.*

tion of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further, That no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission.*

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

GENERAL STATEMENT.

(All references are to the record in case No. 480 unless otherwise indicated.)

Certain complaints on behalf of Reno, Nevada, and vicinity, and Phoenix, Arizona, in the southern part, and of Spokane, Washington, in the northern part of the intermountain region were pending before the commission when the 4th section of the interstate commerce law was amended by the act of June 18, 1910. Within six months thereafter, as provided for in the second proviso of the section, the carriers made application to the commission to be relieved from the operation of the section. The Reno and Phoenix complaints had been treated as one case, and the Spokane complaint as another; and they were still so treated, but the order in each case was entered under said section 4, and both were largely based on the same considerations. The order in the Reno-Phoenix case was directed against seventeen railroad companies—all across-the-mountains carriers and those connected immediately therewith—and is in the following form (R. 33, 34, 35):

FOURTH SECTION ORDER NO. 124.

> In the matter of the applications, Nos. 205, 342, 343, 344, 349, 350, and 352, on behalf of the Transcontinental Freight Bureau, by R. H. Countiss, agent, for relief from the provisions of the fourth section of the act to regulate commerce as amended June 18, 1910, with respect to rates made from eastern points of shipment which are higher to

intermediate points than to Pacific coast terminals.

COMMODITY RATES.

These applications, as above numbered, on behalf of the Transcontinental Freight Bureau, ask for authority to continue rates from eastern points of shipment which are higher to intermediate points in Canada and in the States of Arizona, New Mexico, Idaho, California, Montana, Nevada, Oregon, Utah, and Washington, and other States east thereof, than to Pacific coast terminals.

Full investigation of the matters and things involved in these petitions, in so far as they concern westbound commodity rates, having been had,

It is ordered, That for the purposes of the disposition of these applications, the United States shall be divided into five zones, as described in the following manner:

(The transcontinental groups hereinafter described are as specified in R. H. Countiss, agent's, transcontinental Tariff I. C. C. No. 929.)

Zone No. 1 comprises all that portion of the United States lying west of a line called Line No. 1, which extends in a general southerly direction from a point immediately east of Grand Portage, Minn.; thence southwesterly, along the northwestern shore of Lake Superior, to a point immediately east of Superior, Wis.; thence southerly, along the eastern boundary of Transcontinental Group F, to the intersection of the Arkansas and Oklahoma State line; thence along

the west side of the Kansas City Southern Railway to the Gulf of Mexico.

Zone No. 2 embraces all territory in the United States lying east of Line No. 1 and west of a line called Line No. 2, which begins at the international boundary between the United States and Canada, immediately west of Cockburn Island, in Lake Huron; passes westerly through the Straits of Mackinaw; southerly, through Lake Michigan to its southern boundary; follows the west boundary of Transcontinental Group C to Paducah, Ky.; thence follows the east side of the Illinois Central Railroad to the southern boundary of Transcontinental Group C; thence follows the east boundary of Group C to the Gulf of Mexico.

Zone No. 3 embraces all territory in the United States lying east of Line No. 2 and north of the south boundary of Transcontinental Group C, and on and west of Line No. 3, which is the Buffalo-Pittsburgh line from Buffalo, N. Y., to Wheeling, W. Va., marking the western boundary of Trunk Line Freight Association territory; thence follows the Ohio River to Huntington, W. Va.

Zone No. 4 embraces all territory in the United States east of Line No. 3 and north of the south boundary of Transcontinental Group C.

Zone No. 5 embraces all territory south and east of Transcontinental Group C.

It is further ordered, (1) That those portions of the above-numbered applications that request au-

thority to maintain higher commodity rates from points in Zone No. 1 to intermediate points than to Pacific coast terminals be, and the same are hereby, denied, effective November 15, 1911; (2) that petitioners herein be, and they are hereby, authorized to establish and maintain, effective November 15, 1911, commodity rates from all points in zones numbered 2, 3, and 4, as above defined, to points intermediate to Pacific coast terminals that are higher to intermediate points than to Pacific coast terminals; provided, that the rates to intermediate points from points in zones numbered 2, 3, and 4 shall not exceed the rates on the same commodities from the same points of origin to the Pacific coast terminals by more than 7 per cent from points in Zone No. 2, 15 per cent from points in Zone No. 3, and 25 per cent from points in Zone No. 4.

The commission does not hereby approve any rates that may be established under this authority, all such rates being subject to complaint, investigation, and correction if they conflict with any other provisions of the act.

By the commission:

[SEAL.] JUDSON C. CLEMENTS,
Chairman.

The order in the Spokane case is directed against eleven of the same carriers, relates only to Spokane and other intermediate points on their lines, and expressly provides that the carriers shall comply therewith for a period of not less than two years. In other respects it is the same in substance as the

order entered in the Reno-Phoenix case. (No. 481, R. 12, 13, 14, 15.)

In cases Nos. 480 and 513 in this court, *United States* v. *Atchison, Topeka & Santa Fe Railway Company et al.*, it is sought to set aside the Reno-Phoenix order; while in cases Nos. 481 and 514, *United States* v. *Union Pacific Railroad Company et al.*, the Spokane order is attacked.

HISTORY OF COMPLAINTS ON BEHALF OF INTERIOR POINTS.

A brief review of the complaints before the Interstate Commerce Commission will show the character of the problems that body had to solve and the thoroughness with which they had investigated every phase of the subject.

RENO-PHOENIX COMPLAINTS.

In August, 1908, the Railroad Commission of Nevada began before the Interstate Commerce Commission a proceeding against the Southern Pacific Company and others complaining of rates over the lines of those roads from eastern defined territory to Reno, Nevada, and vicinity. A large volume of testimony was taken, and on June 6, 1910, a report was handed down through Commissioner Lane (19 I. C. C., 238); and how well grounded those complaints were will appear from the opening paragraph of this report, to wit:

> The highest main-line rates to be found in the United States are those from eastern points to stations in Nevada. For carrying

> a carload of first-class traffic containing 20,000 pounds from Omaha to Reno the Union Pacific-Southern Pacific line charges $858. If a like carload is carried 154 miles further, to Sacramento, the charge is but $600. The first-class rate to the more distant point, Sacramento, is $3 per 100 pounds, and to the nearer point, Reno, $4.29 per 100 pounds. If a like carload of freight originates at Denver, 500 miles west of Omaha, the same rates to Reno and Sacramento apply; and if the freight originates at Boston, 1,700 miles east of Omaha, the rates are the same. This interesting rate condition arises out of two simple facts: (1) The whole of the United States from Colorado common points to the Atlantic seaboard, barring a few of the southeastern States, is one wide group or zone from which practically uniform rates to Pacific coast water points are made, and (2) the rates to Reno are based upon these blanket rates to coast cities, and amount to the sum of the rates to the coast plus the local rates back to point of destination. (19 I. C. C., 238, 239.)

The commission granted much of the relief sought, fixing a scale of maximum *class* rates (R. 152, 153), but feeling that it did not have sufficient information to justify an order with reference to *commodity* rates, it directed that the carriers keep a record of all shipments into Nevada during a certain three months, and furnish the commission with a statement showing all pertinent

facts; and the complainants therein were directed, on or before October 1, 1910, to furnish to the commission and to the defendant company a list of commodities upon which commodity rates were desired, together with an outline of the various territories or groups from which commodity rates should apply. (19 I. C. C., 256.)

In October, 1908, the Maricopa County Commercial Club filed a complaint against the Santa Fe, Prescott & Phoenix Railway Company and others, complaining of the rates from eastern defined territory to Phoenix, Arizona, and vicinity. This complaint was considered by the commission along with the complaint of the Railroad Commission of Nevada, and was disposed of in like manner as that complaint, under a separate report handed down on the same day. (19 I. C. C., 257.)

While the complaints were still pending under these orders, section 4 was amended, and the carriers thereafter filed their applications to be relieved from the requirements thereof, and the order complained of in the present case was entered by the commission thereunder.

SPOKANE COMPLAINTS.

The citizens of Spokane, through various bodies, have been persistent, from soon after the passage of the interstate commerce act in 1887, in pressing complaints with reference to rates from eastern points.

The first complaint was filed April 2, 1889, wherein it was insisted:

1. That the rates to Spokane Falls were unreasonable.

2. That they were discriminatory against Spokane Falls in favor of Portland and other points.

3. That a lesser rate was charged for a longer haul to Portland and other terminal points than to Spokane.

An extended hearing was given, and the commission found that the rates in force from St. Paul and eastern points to Spokane were in themselves unreasonable, and considerably reduced the same. (5 I. C. C., 478, 505, 510.)

Subsequently the Great Northern Railroad was constructed, and thereafter an understanding was reached between the jobbers of the Pacific coast, who were complaining of the rates fixed to Spokane, and the transcontinental lines by which the original discrimination against Spokane was restored.

It appears that a right of way through Spokane was donated by the citizens to the Great Northern Company under a supposed understanding that it would grant to the city the same rates that were given to the terminal points; but this alleged agreement not being carried out, a boycott was organized against that company, which resulted in the railroads granting such rates to Spokane that the jobbers of that city were enabled within a certain

territory around the city to successfully compete with the coast jobbers. (15 I. C. C., 390, 391.)

In September, 1906, the city of Spokane and certain commercial bodies thereof filed another complaint with the Interstate Commerce Commission which presented three questions:

1. Whether there was undue discrimination between Spokane and the coast cities, which involved the question whether or not the 4th section was violated.

2. Whether certain privileges were allowed coast traffic which were denied Spokane.

3. Whether the rates to Spokane were inherently unjust and unreasonable.

A large volume of evidence was taken upon this complaint, and on February 9, 1909, Commissioner Prouty handed down the report of the commission, wherein it was held:

1. That the circumstances and conditions at the terminal points were substantially different from those at Spokane, and hence section 4, as then interpreted by the Supreme Court, could not be applied.

2. That sufficient evidence was not presented with reference to the second question to justify consideration of the same.

3. That both the class and commodity rates to Spokane were unreasonably high, and a maximum scale of class rates was prescribed, as was also of commodity rates in so far as they had been attacked in the complaint.

This report embraces over fifty pages of the reports of the Interstate Commerce Commission (15 I. C. C., 376–426), and shows that the most laborious and painstaking inquiry and research had been made into every material question of fact.

The class rates then prescribed by the commission were made effective, except the Union Pacific and the Chicago and Northwestern lines were, upon petitions, relieved temporarily from the effect of the order. As to the commodity rates, the remaining defendants asked for additional time for working out, according to a suggestion of the commission, a more comprehensive scheme which could be applied not only to Spokane, but to additional territory.

On June 9, 1909, the city of Spokane filed a supplemental complaint putting in issue, among other matters, the remainder of the commodity schedules from the eastern destinations to Spokane, and asking that joint rates be named from destinations east of Chicago to Spokane upon both class and commodity rates. After the introduction of a large amount of additional testimony, the matter was again taken under advisement by the commission on December 28, 1909, and on June 7, 1910, the commission, through Commissioner Prouty, handed down another report wherein it was held that the rates then charged upon the commodities specified in the supplemental complaint from the territories mentioned therein to Spokane were unreasonable,

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and a schedule of reasonable maximum rates was filed as an exhibit to the report.

In view of a suggestion of counsel in the present case that the commission in said report found certain rates to be reasonable, which are higher than the rates which would result from an enforcement of the order attacked in this case, special attention is called to the following language of the commission used therein:

> In fixing these rates we have proceeded upon the view that, under the present decisions of the Supreme Court of the United States, we could not use the rate to Seattle as a standard by which to measure that to Spokane. If this were otherwise, if we were free to take into account all the competitive conditions existing both east and west and to determine what, in the light of all these conditions, would be a just and reasonable relation between the rates of Seattle and Spokane, a somewhat different question would be presented. (19 I. C. C., 174.)

It appears, therefore, that the relationship of Seattle and other terminal points to Spokane, and the competitive conditions existing at Seattle, were there given no consideration whatever by the commission, because the construction this court had given sections 3 and 4, when read together, had in the mind of the commission prohibited them from considering those matters.

However, the commission, not being wholly satisfied with the absolute accuracy of the result

reached, did not order the rates prescribed into immediate effect, but said:

> We desire, however, to proceed in this matter with great caution and have therefore determined before making a final order to learn the result of an actual test. Carriers will be required, for the months of July, August, and September, 1910, or for such other representative months as may be determined upon by the commission after conference with the carriers, to furnish an accurate and detailed account showing the revenue which accrued upon business actually handled under present rates and the revenue which would have accrued upon the same business had the rates here prescribed been in effect. (19 I. C. C., 178.)

While this complaint remained thus suspended, section 4 of the interstate commerce act was amended by Congress.

APPLICATIONS OF CARRIERS FOR RELIEF FROM PROVISIONS OF THE FOURTH SECTION.

While the various complaints above mentioned were thus pending, and within six months after the amendment of section 4 by Congress, the carriers, through their proper agents, filed a number of applications asking to be relieved from the hard and fast rule of the 4th section. These various applications were similar in form, and the first may be taken as an example of them all. This, after setting forth the several tariffs then in force, proceeded:

> In the name and on behalf of each of the carriers parties to the above-named tariffs,

> the undersigned, acting as agents and attorneys or under authority of concurrences on file with the commission from each of the said carriers, respectfully petition the Interstate Commerce Commission for authority to continue all rates shown in the above-named tariffs from eastern shipping points designated to the Pacific coast terminal points and other points designated, lower than rates concurrently in effect from intermediate points, and to intermediate points in Canada and in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Washington, and points east thereof.
>
> This application is based upon the desire of the interested carriers to continue the present method of making rates lower at the more distant points than at the intermediate points (R. 50);

and there follows a recital of the several grounds which, it was claimed, justified the relief sought.

Thereupon the entire matter was again taken under consideration by the commission, and a large mass of additional testimony was introduced, and arguments extending over many days were heard; and after another most painstaking research into evey phase of the question the commission, through Commissioner Lane, on June 22, 1911, handed down its report in the Reno and Phoenix cases, and on the same day, through Commissioner Prouty, handed down its report in the Spokane case; and on these reports the orders now attacked were entered.

PETITION OF ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL. (CASES NOS. 480 AND 513 IN THIS COURT.)

On the 4th day of October, 1911, the Atchison, Topeka & Santa Fe Railway Company and others filed in the United States Commerce Court their petition wherein is attacked the validity of the order entered in the matter of the Reno and Phoenix complaints. In this petition the carriers insist that the commission should have relieved them from the provisions of the 4th section on account of the existence of the following conditions at the terminals which did not exist at the interior points:

1. Water competition from the Atlantic coast around Cape Horn and through the Strait of Magellan and across the Isthmuses of Tehuantepec and Panama. (R. 8.)

2. Competition by water from the Orient. (R. 9.)

3. Competition between the various competing lines of railroads. (R. 9.)

4. So-called *market* competition; that is, competition between manufacturers on the Atlantic coast, who can ship their products by water and across the isthmuses to the Pacific coast, and manufacturers of the Middle West, who can ship to the Pacific coast terminals only by rail, or by paying cost of railroad transportation from point of origin to the Atlantic coast and thence by water to the Pacific terminals. (R. 10.)

It was insisted that the commission's order was void because—

1. The 4th section of the interstate commerce act is unconstitutional in that it vests legislative power in the Interstate Commerce Commission, and prescribes no rule for the guidance of the commission in determining whether or not a carrier may be relieved from its provisions, and if so to what extent, but leaves the matter to the arbitrary will of the commission. (R. 35, 36.)

2. That the order if enforced will in effect confiscate the petitioners' property. (R. 36, 37, 38.)

3. That the commission is not empowered to fix differentials which shall be maintained between the rates compelled by competition at the terminals and the just and reasonable rates which the petitioners are entitled to charge at interior points. (R. 39, 40.)

4. That rates to the territory in question have heretofore been constructed on the principle of establishing just and reasonable standard class rates and making only such exceptions thereto as specified commodity rates as competition has required, which principle is overthrown by the order of the commission, and terminal rates are wrongfully made the measure of what shippers may lawfully receive at interior points. (R. 40, 41.)

5. That there are numerous rates to interior points reasonable within themselves, and the carriers are entitled to have these several rates con-

sidered and their reasonableness determined separately; and the commission acted arbitrarily and without authority of law in fixing zones and percentages applicable to all traffic regardless of whether such percentages will permit the moving of traffic to terminal points and at the same time will allow reasonable rates to intermediate points. (R., 41.)

The United States filed a motion that the petition be dismissed upon the following grounds (R., 329):

1. Because section 4 of the interstate commerce act as amended by the act of June 18, 1910, is constitutional.

2. Because the petition shows that the Interstate Commerce Commission had jurisdiction over the subject matter involved, and that the order was entered in a proceeding properly instituted and conducted, and was within the scope of the commission's authority.

3. Because the petition fails to show that petitioners, or either of them, were deprived of their property within the meaning of the Constitution of the United States.

4. Because, even if the order be void because not within the commission's statutory authority, then the prohibition of the statute against charging a greater sum for the shorter than for the longer haul is absolute, and its operation can not be enjoined by the courts.

5. Because the petition contains no equities upon its face. (R. 330.)

PETITION OF UNION PACIFIC RAILROAD COMPANY ET AL.
(CASES NOS. 481 AND 514 IN THIS COURT.)

On the 4th day of October, 1911, the Union Pacific Railroad Company and others filed their petition attacking the order entered by the commission in the Spokane case.

The grounds of attack are the same as those relied upon by the carriers in the other case, and the United States relied upon the same grounds in a motion filed to dismiss the petition in this case. (No. 481, R. 53.)

PROCEEDINGS BEFORE THE COMMERCE COURT.

The cases were heard upon the motions of the United States to dismiss, and also upon the motions of petitioners for temporary injunctions. The motions of the United States were overruled by the court solely upon the ground that the Interstate Commerce Commission had no power to determine the relation of the long and short haul rates irrespective of absolute rates. (R. 346.) The court considered only this question and the one as to the constitutionality of the act, holding that the act was constitutional. (R. 342.) Judge Archbald concurred in the result, but was also of the opinion that section 4 of the act as amended is unconstitutional, and further that the orders of the commission are void because they do not relate to special cases within the meaning of the provisos of section 4. (R. 347–350.) Temporary injunctions were granted by the court, errors were assigned,

and from these interlocutory decrees appeals were prosecuted by the United States and the Interstate Commerce Commission and other intervenors to this court. (R. 351, 355, 356; No. 481, R. 65.) Thereafter the United States and other parties defendant elected to stand upon the motions to dismiss, and the court thereupon entered final decrees in accordance with its former opinion. (No. 513, R. 1, 4; No. 514, R. 1, 3.) From these decrees appeals were likewise prosecuted to this court, and the two sets of appeals have been consolidated for hearing.

I.

The order made by the commission was justified by the facts found by them; and they gave full consideration and weight to every character of competition relied upon by the carriers.

It is important to first understand the facts as found by the commission with reference to the various elements, relied upon by the carriers, and what weight, if any, was given by the commission to each of them; and the questions of law applicable to those facts may then be much more intelligently considered.

In determining the legal effect of these findings it must be kept in mind that, as the burden of proof is on the carriers, a negative finding is favorable to the appellants.

1. *The commission did not find in either the Reno-Phoenix or the Spokane case that the rates from the eastern territory to the Pacific terminals are forced by ocean competition.*

In the Reno-Phoenix case, after giving in detail the history of the contest between ocean and rail transportation, Commissioner Lane said:

> We have thus traced the history of this protracted struggle between the ocean and the land carriers that we might clearly appreciate the strategy of the railroads and its effect upon the ocean-borne traffic. One water route after another has been rendered innocuous. To meet the competition of the railroads the tendency of the ocean carriers has been to shorten the time consumed in passing by water from coast to coast. The clipper ship has been forced to give way to the steamship, and the steamship has been compelled to transship by rail a portion of the distance. The routes by way of Cape Horn and the Straits of Magellan have been virtually abandoned. For nearly 40 years the Panama route has been under railroad control. When an attempt was made to reestablish this route as a vital competitor, the railroads used their own ocean-and-rail line to eliminate it from the field. So that for several years there has been but one ocean line which apparently has no railroad connection, that of the American-Hawaiian Steamship Company; and this line lives upon sufferance, its rates being made with the knowledge of the railroad company and with a more or less definite relation to the transcontinental rail rates. Within the past few months another water competitor has entered the field, the California-Atlantic line, which has done an extensive business both eastbound and westbound for the short time

that it has been in existence, but the prophecy made by the railroad witnesses is that it will not last long.

In the light of this history it is not to be gainsaid that the transcontinental lines must give consideration to sea competition. For 30 years and more their effort has been to "neutralize and control" such competition, in the phrase of Mr. Stubbs, vice president of the Southern Pacific system. While they have subsidized, bought, and controlled the water carriers, there has always been present to the mind of the traffic manager of the transcontinental railroad the existence of the ocean and the possibility of its use. Without a ship upon it the ocean has the power to restrain, in some degree, the upward tendency of rail rates. A railroad may not safely indulge its desire to impose all the traffic will bear between two ocean ports, and it may truly be said that the least poetical of railroad traffic managers never looks upon the ocean without a sense of awe.

The railroads, moreover, must soon meet with a competition by water more intense than any that they have heretofore suffered, for within three years another route, one more important, searching, and determinative in its effect upon railroad rates than any other will be opened—a route all water by way of the Panama Canal. The cutting of this canal will in effect bring the Straits of Magellan 3,500 miles to the northward, and with modern steamships it is estimated that San Francisco will by water be removed from New York but 14 days. (R., pp. 100–102.)

With reference to the immediate effect of ocean competition upon railroad rates, Commissioner Lane said:

> There have been two periods of intense water competition since the year 1887, when the act to regulate commerce went into effect. One following the establishment of the Merchants' line via the Panama route, the other immediately following the establishment of the Tehuantepec route in 1906. The effect on commodity rates out of New York of the establishment of the Merchants' line of steamships has already been adverted to in the testimony given by Mr. Luce of the Southern Pacific. In order to ascertain the effect upon commodity rates of the establishment of the American-Hawaiian line we have secured from the carriers a statement of the fluctuations in their rates since the year 1906, from which it appears that, notwithstanding the presence of what purports to be active water competition, commodity rates by the rail carriers have been increased rather than lowered during that period. Out of 1,535 commodity rates compared by the carriers it appears that no change has taken place since December 1, 1906, as to 696 of such commodities, reductions have been effected in 287, advances and reductions as to 132, and advances as to 418. Of the items increased, the rates of 318 commodities were increased from the whole eastern blanket. The reductions in the greater part were effected by taking single articles from the classification and giving to them commodity rates from all points of origin. (R., pp. 104, 105.)

The commissioner sets out extensively the evidence given by Mr. Paul Morton in the case of Business Men's League of St. Louis against the A., T. & S. F. Ry. Co., 9 I. C. C. Rep., 318; and among other things Mr. Morton was asked if it was not true that "necessities of business to-day are such that jobbers on the Pacific coast would naturally more and more prefer the quick and regular service of rail lines to the irregular and uncertain and long service of the ocean steamship," to which he replied "I think they would on anything like an equality of rates." (R., p. 115.)

After describing at length the location of the various points on the Pacific to which terminal rates are given, Commissioner Lane said:

> From this rough sketch of the Pacific coast terminal situation it is at once perceived that it is not the result of the rigid application of any principle based entirely upon sea competition, for terminal rates are given to cities which are not upon the ocean, and the railroads themselves in some cases have forced the sea carriers to absorb inland rates in order to meet railroad competition at these interior terminal points. (R., pp. 89, 90.)

and again, in discussing the question of artificial adjustment:

> The carriers have taken from San Francisco in large part the advantage that she should enjoy from her situation upon the ocean by throwing around her a circle of terminal points 100 miles or so inland. By doing this they have forced water carriers to meet rail com-

petition at these interior places, and yet the railroads urge that the rates are made to meet ocean-to-ocean competition. (R., p. 123.)

In the Spokane case, as to the effect of ocean competition upon rates, Commissioner Prouty said:

> The complainants insisted upon the original hearing, and have renewed the claim at every stage of this proceeding, that there is no active water competition; that the whole claim of water competition is put forward by the defendants as a pretense by which to justify the rank discrimination against interior points. The first inquiry is, therefore, whether water competition actually exists which has produced and does produce an effect upon rates from the Atlantic seaboard to the Pacific coast, from New York to San Francisco, treating these two cities as illustrative of the localities in which they stand.
>
> This question of fact has been often considered in the past, and with but one unvarying result. The circuit court of the United States has twice found, once in a proceeding concerning these very rates to Spokane, that active water competition does exist which controls the coast rate. (Citing cases.)
>
> This commission has repeatedly found and recognized the same fact. (Citing a long list of cases.)
>
> In the original hearing of the *Spokane case* we reexamined that whole question and reaffirmed our decision. City of *Spokane* v. *Northern Pacific Ry. Co.* (15 I. C. C. Rep., 376.)
>
> In the recent hearing upon the applications of transcontinental lines for leave to disregard

the rule of the fourth section evidence has again been produced upon this subject which conclusively shows that the previous finding of the commission is right. We had before us in the *Spokane case* the manifests of two ships from New York to San Francisco, and in the last hearing we had the manifests of two other ships. They showed in detail the articles transported, the point where they originated, the destination for which they were intended, and the rate under which they moved. These actual transactions prove more conclusively than any mere statement that almost every article which is the subject of ordinary commerce between the coasts can and does move from New York to San Francisco by water at rates materially lower than those maintained by the defendants by rail. We have used San Francisco as the destination port upon the Pacific coast, and in some instances rates from New York to San Francisco are a trifle lower than to other coast cities, but, generally speaking, the San Francisco rate is maintained at Los Angeles, Portland, Seattle, Tacoma, and other points upon the coast.

Passing for the time being the extent and effect of this competition at interior points, it must be found as a fact that there is real and active water competition between New York and San Francisco, between the Atlantic and the Pacific coasts, which does limit the rate of transportation which can be charged by rail between those points upon nearly every article which moves by rail. (R., pp. 175–177.)

and again reverting to this subject, he said:

> In this connection it should be observed that in the past water competition has been by various devices upon the part of rail carriers restrained and subdued.
>
> At the outset the special contract system was devised, under which large rebates from the going rate were paid to those shippers who exclusively patronized the rail lines. By this scheme the ships were soon robbed of the bulk of their traffic.
>
> When this expedient would no longer be tolerated trancontinental railroads subsidized the Panama line, which had become the active water competitor, by purchasing a considerable part of the total available space in the boats of that line from New York, and thus controlling the rates by that route. This was continued for years.
>
> Since the advent of the American-Hawaiian line there has been, not perhaps a definite agreement between it and the rail lines, but a general understanding that such rates should be maintained by water as compared with rates by rail as would give to the vessels a reasonable amount of traffic from the immediate vicinity of New York.
>
> Of more importance than all the rest have been extremely harmonious relations generally existing between shippers and rail carriers upon the Pacific coast. Those shippers most interested in transcontinental rates have been the jobbers of San Francisco and other coast-terminal cities. The only desire of those shippers has been that rates should be so

adjusted as would enable them to transact business against interior cities. So long as this relation of rates has existed the jobber has been willing to pay both a high rate to San Francisco and a high rate from San Francisco. In consideration that this relation should be maintained the shipper upon the coast has found it for his interest to patronize largely the rail carrier without inquiring too closely what rates were available by water.

Competition at the present time seems to be more active. An independent line has been established upon the Pacific coast. The Panama Railroad has become an actual competitor for this business. The American-Hawaiian line, finding competitors in the field, has been compelled to reduce its charges. Testimony recently given before the commission showed that a line of steamers had been put on from New Orleans which was actually handling consignments of lumber from New Orleans to San Francisco for 45 cents per 100 pounds and that shipments of lumber were moving from Memphis to San Francisco at 55 cents per 100 pounds, as against the present transcontinental rate of 75 cents.

Everything indicates that the effect of this water competition will increase rather than diminish from now until the completion of the Panama Canal and when that waterway is open for business both rate and facility will be very much better than to-day. (R., pp. 182, 183.)

From the facts as stated in both these cases it certainly does not appear that the present rates to the

Pacific terminals from the Eastern sections have been forced or fixed by water competition. True, such competition has been and always will be an important factor in rate making, and it certainly *influences*, and in a limited way *controls*, those rates; but it clearly appears that the railroad carriers practically control the ocean rates, have when so desired either driven the ships from the seas or dictated their rates for transportation, as is now being substantially done with the only ocean competitor of consequence, and have *among themselves* fixed the terminal rates with but little reference to the sea, going to the extent, without any apparent reason, of extending the terminal rates to points 100 miles inland, and forcing the water carriers to absorb the cost of haul to those points. It is also true that when the Panama Canal shall be completed a new element will confront the railroad carriers, but the order in the Spokane case will have expired before that event, and the Commissioners had to deal with present and not future conditions. That the terminal rates could be substantially increased and the loss of traffic arising therefrom would not be materially affected before the completion of the canal is apparent. Hence, the *present* terminal rates are not compelled, but are fixed by the volition of the carriers.

2. *The commission did not find that the rates from interior points to the Pacific terminals are not influenced by water competition, but found that they are not compelled by such competition, and are the result of the volition of the carriers.*

The question of market competition is discussed very extensively by Commissioner Lane and at some length by Commissioner Prouty, but these discussions will not be here set out.

After considering at length this subject, Commissioner Lane said:

> Furthermore, we find that this situation is artificial in that it has been brought about by a procession of agreements between carriers. Each carrier has been appeased by giving to it something which would cause it to be satisfied with the arrangement. The carriers have competed with each other across a table until their minds agreed upon a condition that would prevent rate wars. (R., pp. 123, 124.)

And in concluding his discussion of the same subject, Commissioner Prouty said:

> Considering this question broadly and in all its aspects, we can not say that the legitimate effect of water competition upon the Atlantic seaboard may not be to reduce the rail rate from interior points. (R., pp. 185, 186.)

3. *In the Reno-Phoenix case the commission found that the carriers had not shown that the existing rates to the terminals would not be reasonable if extended to the intermediate points.*

In considering the movement westward of the industrial productions, Commissioner Lane said:

> Rates that were introduced then purely for market competitive reasons may be to-day reasonable in themselves. So, too, rates then established from Chicago to meet conditions

> at San Francisco, a competitive terminal, and justifiably made lower to that more distant point than to intermediate points, may in the course of years have become, by reason of increased volume of traffic, growth of population, and new methods of operation, so reasonable as to make the imposition of higher rates at intermediate points unjustifiable. (R., p. 122.)

And in summarizing the situation and the commission's treatment thereof he said:

> In this case and under these applications the commission has given thought to many considerations not touched upon in this report, some of which are suggested by the tables to be found in the Appendix (C–D) hereto—such, for instance, as the reasonableness of the transcontinental rates upon commodities in and of themselves when applied from different points of origin and the relation of the cost of service over the Central Pacific when delivery is made at Reno or at San Francisco. And when we have considered the return per ton-mile yielded by many of these rates it is not remarkable that other carriers from the east have pressed forward, even to their own temporary financial embarrassment, to reach these coast terminals. No other carriers in this country enjoy such long hauls upon so great a volume of high-class traffic as do these transcontinental railroads. Their fine earnings are testimony to this effect, as well as to the competency of their management. If the principle that a railroad should charge what the traffic will bear is the criterion of railroad

> rates, no exception can be taken to the transcontinental situation, for it is masterfully designed to secure a maximum of revenue and yet develop such industries and benefit such communities as the railroad in its wisdom may wish to thrive, for the growth of the Pacific coast certainly is in no small part to be accredited to the discretion lodged in and exercised by the transcontinental traffic manager (R. pp. 127, 128, 129).

In closing his discussion of the entire matter Commissioner Lane concludes that the carriers involved have not established "*that the rates to the coast cities, if extended by them from eastern points outside the zone of water influence, are not fully compensatory.*" (R. p. 129.)

4. *In the Spokane case the commission found that the terminal rates when applied to the interior points are reasonable as to zone 1, and with the differentials fixed by the commission are reasonable as to the other zones.*

Upon this question, Commissioner Prouty said:

> Without inquiring what the law may have been when it was only necessary to show the existence of dissimilar circumstances and conditions at the more distant point, it is clear to us that to-day competition at that point can not be relied upon as a justification for the higher intermediate rate, unless the effect has been to reduce, below what it would otherwise be, the long-distance charge. It would be the rankest discrimination to allow these carriers to make a higher charge at the intermediate point for the shorter haul unless they were

compelled by some cause beyond their control to accept at the long-distant point less than a reasonable compensation for the service.

Upon the question of fact the commission is concluded by its previous findings in this case. As already stated there are in effect to-day some 1,300 commodity rates from eastern destinations to north Pacific coast terminals and we have suggested as reasonable a schedule of about 550 rates from the same points of origin in the East to Spokane. These 550 items move the bulk of the traffic both to the coast and to Spokane. The rates found reasonable by us from St. Paul to Spokane are substantially the same as those from St. Paul to Seattle, but from territory east of St. Paul they are higher, depending upon the distance. Our rates from Chicago to Spokane are about 10 per cent higher than the present coast rates from the same point.

If therefore the fourth section were to be applied, having reference to this contention of the complainants alone, we must hold that from the Missouri River and corresponding territory no higher rate should be charged to Spokane and Spokane territory than to the coast, but that from Chicago and territory east of the Missouri River generally a higher intermediate charge might be made. (R., pp. 179, 180.)

5. *The commission found in the Reno-Phoenix case that the carriers have not shown that the charging of the present rate to the intermediate points is not unjustly discriminatory against those points in favor of the terminals.*

From a consideration of the entire matter, Commissioner Lane draws the following conclusion:

> The carriers herein involved have not shown that undue discrimination was not effected by their rate adjustment between points in Nevada and points in California, nor have they established that the rates to the coast cities, if extended by them from eastern points outside the zone of water influence, are not fully compensatory. (R., p. 129.)

6. *The commission found in the Spokane case that the exacting of a greater charge for the shorter hauls in excess of the differentials fixed by them would be an unjust discrimination against the intermediate points.*

As above shown, Commissioner Prouty found that the coast rates would be reasonable rates to the terminals except as indicated by the differentials fixed by the commission; and immediately before describing the orders to be entered he concludes his entire discussion by saying:

> They (the carriers) can not so adjust their whole tariff scheme, upon the plea of water competition, as to concentrate in these coast cities commercial and transportation advantages to which their mere location does not entitle them, *and that in substance is the effect of the present rate adjustment.* (R., p. 188.)

7. *The commission gave due consideration and weight to every character of competition relied upon by the carriers.*

It is insisted especially, in the brief filed on behalf of the Denver & Rio Grande Railroad Co. and the

Western Pacific Railway Co., that the commission failed to give consideration, in their finding of facts, to market competition. In this counsel are mistaken.

That market competition was considered and proper weight was given thereto by the commission clearly appears from the following expressions upon this subject:

Commissioner Lane said:

> Market competition, as we have seen, is a euphemism for railroad policy. The history of the fourth section makes clear that it was born out of a desire, and has been amended out of the purpose, to restrict the force and effect of market competition. The examples cited before Congress by those who have advocated an absolute long-and-short-haul section have largely been such as arose out of railroad policy, not such as were developed by transportation competition. *Congress, however, has not seen fit to say (and perhaps most wisely so) that this economic force shall not be allowed to have its play in the making of rates. Market competition must be considered as one of those circumstances affecting a rate situation with which we are called upon to deal.* But may it not be said that while the language of the statute does not say that market competition shall not be allowed to justify the charging of the higher rate to the nearer point, the very spirit of the section makes against the free application of any such justifying principle? A national policy may veto a railroad policy just as a public need may overcome and set aside a private desire. Expe-

rience has demonstrated to the National Legislature that it is not safe to leave to the carriers the determination of the question what markets should be brought into competition with one another. The policy of Congress seems to be that a railroad may be compelled by transportation competition to make its rates lower than it otherwise would between two competitive points, and that this will justify a breach of the prohibition of the fourth section; but the desire of a number of shippers to reach a market is a force to which the carrier may not yield unless it can establish clearly that the adoption of such policy will not unfairly discriminate against one community and in favor of another and will not produce those results which the law was intended to destroy. *Clearly to allow for market competition as a sole and controlling factor under the fourth section is to render it nugatory, for this would be tantamount to saying that a railroad could justify every discrimination as between communities by the assertion of nothing more than its own determination of policy.*

We must regard the proviso in the fourth section as subordinate to the preceding clause prohibiting the higher rate for the shorter haul, and to carry out this intent of the law a carrier must establish before this commission, in order to secure an order of exception thereunder, more than merely its own desire to haul a great volume of traffic between two distant points; it must prove that by such a policy it will not impose unreasonable rates upon any intermediate point, and that its policy will not

work an injustice of which such intermediate point may fairly complain. Unless it does make such proof this commission is not justified under the law in excusing it from adopting its rates to the more distant point as the basis for rates to the nearer points. (R., pp. 126, 127.)

Upon this same subject Commissioner Prouty said:

The question may arise as to what elements the commission should now take into account in determining whether permission should be granted to deviate from the rule of the fourth section. It was formerly held by the commission that in applying that section only competition by water and competition with railway lines not subject to the act to regulate commerce could be considered; that all other forms of competition should be disregarded. Is this rule to be still observed?

We think not. The former holding of the commission was under the section as it then existed and expressed an attempt to so construe the words "circumstances and conditions" as to give some real vitality to that part of the act. The section to-day in its practical application is entirely different and the questions presented for consideration are different. We are considering now not merely whether circumstances at the two points are dissimilar, but whether, on the whole, that dissimilarity justifies a departure from the rule of the section.

Competition of carriers subject to the act has always been a factor with us in determin-

ing whether a preference in favor of a given locality is due or undue, and that is substantially the question which must be answered in passing upon an application under the present fourth section.

Strictly speaking, there is no such thing as market competition which is distinct from competition between the lines of transportation serving the market. A market can only compete through the agency which transports for it. The carrier makes a rate from a given market, not out of favor to that locality, but because it desires to obtain traffic which will not otherwise come to it. *There would seem, therefore, to be little distinction between the competition of markets and the competition of rival railroads. The whole situation must be considered by us in passing upon these applications.* (R. pp. 171, 172.)

In closing the discussion of the several kinds of competition which are claimed by the carriers to effect rates to the coast cities, Commissioner Prouty said:

Admitting, however, that it is for these defendants to say to what extent, if at all, they will meet these competitive conditions, they are not at liberty, in meeting them, to adopt such a policy nor to execute the policy adopted in such a manner as to unjustly discriminate between different localities.

They may, perhaps, determine whether they will apply the coast rate, which is fixed by water competition, at the interior point, but if they apply it at one point they must apply

> it at others which are similarly situated; they can not, in the absence of some sufficient reason, give Chicago that rate and refuse it to St. Louis and Kansas City. They can not so adjust their whole tariff scheme, upon the plea of water competition, as to concentrate in these coast cities commercial and transportation advantages to which their mere location does not entitle them, and that in substance is the effect of the present rate adjustment. (R., pp. 187, 188.)

and again:

> *Looking at this whole situation and endeavoring to justly consider the interests of all parties affected,* including the carriers, we are of the opinion that from zone 1 no higher charge can justly be made at any intermediate point than to a more distant point. The eastern limit of this territory is approximately 1,500 miles from the Atlantic seaboard, almost midway between the Pacific and Atlantic Oceans. No traffic has ever been, and none probably ever will be transported from this section to the Atlantic coast and thence by water to the Pacific coast. *Giving full weight to the effect of competition of all kinds,* we can find no justification for a system of rates which maintains from this territory a higher charge to any interior point than is made to the coast (R., p. 189);

and a similar finding is implied in the fixing of differentials as to the other zones. (R., pp. 190, 191.)

II.

The commission did not err, as against the carriers, in their construction of section 4 as amended by the act of 1910.

Commissioner Lane, speaking for the commission in the Reno-Phoenix case, thus states their construction of section 4:

> (1) That the fourth section as amended in 1910 is as a whole constitutional, a provision of law within the proper scope of congressional jurisdiction.
>
> (2) That the proviso authorizing this commission to permit exceptions to the general prohibition of the section is not a grant of arbitrary or absolute power, but its exercise must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such exceptions legal and proper and in no wise antagonistic to other provisions of the act.
>
> (3) That it must be affirmatively shown by the carriers seeking such exception that injustice will not be done to intermediate points by allowing lower rates at the more distant points.
>
> (4) That the intendment of the law is to make its prohibition of the higher rate for the shorter haul a rule of well-nigh universal application, from which this commission may deviate only in special cases and then to meet transportation circumstances which are beyond the carriers' control; that is to say, a carrier shall not prefer the more distant point by giving it the lower rate because of any policy

> of its own initiation, but if at the more distant point it finds a condition to which it must conform under the imperious law of competition if it would participate in traffic to that point it may discriminate against the intermediate point without violating the law, provided it establishes such necessity before the commission. But to this discrimination there may be a limit set by the commission. The discrimination may not be such as to offend the reasonable standards of the law, for it is said that the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section. (R., pp. 84, 85.)

and again:

> If now we have apprehended aright the intent of Congress there comes before us upon an application for permission to deviate from the prohibitive clause of the fourth section the inclusive question whether by such deviation any provision of the act will be violated, and the burden rests upon the carrier to satisfy our minds that no such result would be effected by the granting of such permission—that no injustice will be done to the intermediate point with relation to the more distant point. As already said, the purpose of the statute which we are required to enforce is, succinctly stated, to preserve harmony between communities, individuals and carriers, to allay discord, and prevent, so far as may be, oppression and injustice.
>
> * * * * *

> A community is entitled to something more than a reasonable rate; it is entitled to a nondiscriminatory rate. A carrier may not say, "We will give to this community a reasonable rate" and meet the full requirement of the law; it must view its rates as a whole and see to it that they effect no advantage or preference to one community over another which does not arise necessarily out of the transportation advantages which the one has over the other. (R., pp. 124, 125.)

In the Spokane case Commissioner Prouty, after an exhaustive discussion of the statutes and the amendment, states the commission's construction of section 4 in the following language:

> Bearing in mind the authority which the commission now administers in prescribing a reasonable rate and in declaring and correcting an undue preference, it seems evident that the purpose of Congress was to commit to this body the duty of determining whether if the carrier was permitted to charge a higher rate at the intermediate point that would result in a violation of the provisions of the act. But in so doing the commission can not act arbitrarily. It must investigate each case, and if after such investigation it is of the opinion that a departure from the rule of the fourth section would not result in unreasonable rates or undue discrimination, it must permit that departure. If, upon the other hand, it is of the contrary opinion, it must refuse the permission. (R., p. 169.)

and again:

> We hold that under the amended section it is the duty of the commission to investigate each application made by a common carrier for leave to depart from the rule of the section. If we are of the opinion, upon a view of the entire situation, that to grant the application will not result in unjust or discriminatory rates and practices, then it should be granted; otherwise it should be denied; and the commission may, if in its opinion an unlimited departure from the rule of the section ought not to be granted but that a limited departure should be, prescribe in any way that is definite and certain the extent to which the departure may be made. (R., pp. 173, 174.)

The constructions in both cases are substantially the same, to wit: *First*, that the burden is upon the applying carrier to show that the greater charge for the shorter haul will not result in unreasonable rates to or work an unjust discrimination against the intermediate point; and *Second*, when such fact is established the commission *must* grant relief against the hard and fast rule of the section, and this relief *must* extend to the point where unjust discrimination will arise. In other words, that a carrier is vested with a lawful right to charge any rate which is reasonable within itself and is not unjustly discriminatory, and the commission is under legal compulsion to grant such right. When the constitutionality of the act is established, it is not understood that counsel for the carriers contend

for a more favorable construction of the section than this; nor that it is seriously denied that the burden of establishing the right is on the carrier.

When, then, is a charge of a larger sum for a shorter haul embraced in the longer haul an unjust discrimination within the meaning of this section?

III.

Under the facts found by the commission, the adjustment of rates between the terminal and intermediate points which the carriers seek to maintain, but which were condemned by the commission, is unjustly discriminatory under section 4, as originally enacted.

As shown in the reports of the commission, it was the phrase "under substantially similar circumstances and conditions" that for a time caused doubt in the minds of the commission, the carriers, and the courts with reference to the meaning of this section. The first opinion construing this section was written by Judge Cooley as chairman of the Interstate Commerce Commission. (1 I. C. C. Rep., 278, 291.) He entered into an extensive and instructive review of the history of the section while before the committees and both Houses of Congress, and with reference to what competition was sufficient to bring about substantially dissimilar circumstances and conditions, said:

> The existence of actual competition, which is of controlling force in respect to traffic important in amount, may make out the dissimilar

circumstances and conditions, entitling the carrier to charge less for the longer than for the shorter haul over the same line in the same direction, the shorter being included in the longer, in the following cases:

(*a*) When the competition is with carriers by water which are not subject to the provisions of the statute;

(*b*) When the competition is with foreign or other railroads which are not subject to the provisions of the statute;

(*c*) In rare and peculiar cases of competition between railroads which are subject to the statute, when a strict application of the general rule of the statute would be destructive of legitimate competition. (1 I. C. C. Rep., 278, 291.)

But how potential he regarded it necessary for this competition to be before it would create substantially dissimilar circumstances and conditions appears from the following remarks:

> Every railroad company ought, when it is practicable, to so arrange its tariffs that the burden upon freights shall be proportional on all portions of its line and with a view to revenue sufficient to meet all the items of current expense, including the cost of keeping up the road, buildings, and equipment, and of returning a fair profit to owners. But it is obvious that, in some cases, when there is water competition at leading points, it may be impossible to make some portion of the traffic pay its equal proportion of the whole cost. If it can then be made to pay

> anything toward the cost, above what the taking of it would add to the expense, the railroad ought not, in general, to be forced to reject it, since the surplus, under such circumstances, would be profit. (1 I. C. C. Rep., 288.)

As pointed out by Commissioner Prouty (R., p. 158), the commission subsequently modified its views with reference to the character of competition that might be considered in determining whether conditions were substantially similar, and in *Interstate Commerce Commission* v. *Alabama Midland Railway Co.*, 168 U. S., 144, it insisted:

> That the existence of rival lines of transportation and, consequently, of competition for the traffic, are not facts to be considered by the commission, or by the courts, when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the fourth section of the act (p. 163).

This court, however, held to the contrary, but in the course of its opinion said (p. 167):

> In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that *we do not hold that the mere fact of competition, no matter what its character or extent,* necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of compe-

> tition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration.

The Alabama Midland case grew out of an application to the commission made by the Board of Trade of Troy, Alabama, wherein it was complained that certain railroads charged more for a shorter haul to Troy than for a longer haul to Montgomery, the former haul being embraced in the latter. It appeared that the rates to Troy were within themselves reasonable; and the character of competition existing at Montgomery is described in an extract from the opinion of the Circuit Court of Appeals copied into the opinion of this court, as follows:

> The population and volume of business at Montgomery are many times larger than at Troy. There are many more railway lines running to and through Montgomery, connecting with all the distant markets. The Alabama River, open all the year, is capable, if need be, of bearing to Mobile on the sea the burden of all the goods of every class that pass to or from Montgomery. The competition of the railway lines is not stifled, but is fully recognized and intelligently and honestly con-

trolled and regulated by the traffic association in its schedule of rates. There is no suggestion in the evidence that the traffic managers who represent the carriers that are members of that association are incompetent or under the bias of any personal preference for Montgomery or prejudice against Troy that has led them, or is likely to lead them, to unjustly discriminate against Troy. When the rates to Montgomery were higher a few years ago than now, actual active water-line competition by the river came in, and the rates were reduced to the level of the lowest practical paying water rates, and the volume of carriage by the river is now comparatively small, but the controlling power of that water line remains in full force, and must ever remain in force as long as the river remains navigable to its present capacity. And this water line affects to a degree less or more all the shipments to or from Montgomery from or to all the long-distance markets. It would not take cotton from Montgomery to the South Atlantic ports for export, but it would take the cotton to the points of its ultimate destination if the railroad rates to foreign marts through the Atlantic ports were not kept down to or below the level of profitable carriage by water from Montgomery through the port of Mobile. The volume of trade to be competed for, the number of carriers actively competing for it, and a constantly open river present to take a large part of it whenever the railroad rates rise up to the mark of profitable water carriage, seem to us,

> as they did to the Circuit Court, to constitute circumstances and conditions at Montgomery substantially dissimilar from those existing at Troy, and to relieve the carriers from the charges preferred against them by the board of trade. (Pp. 171, 172.)

Consequently, that case involved a reasonable rate for the shorter haul, and a rate *absolutely forced* for the longer haul.

The case in which the most extended and careful consideration to this section was given was *East Tennessee, Virginia and Georgia Railway Co.* v. *Interstate Commerce Commission*, 181 U. S., 1. That case arose out of a complaint filed before the commission on behalf of Chattanooga wherein it was complained that the defendant company was charging less for hauling goods through Chattanooga to Nashville than for hauling the same goods to Chattanooga. It developed that there were two schedules of rates, a northern and a southern, the former of which was the lower. Nashville was given the advantage of the northern rates by the Louisville & Nashville Railroad, and it was necessary for the East Tennessee, Virginia & Georgia road also to charge the northern rate to that point or procure none of that business. The commission did not determine whether the defendant company was justified in charging more for the shorter than for the longer haul, but held that notwithstanding the competition at Nashville the company could not make the less charge to Nashville without first applying to the commission and

obtaining an order granting it permission to do so; and hence it made an order restraining the company from charging more for the shorter haul to Chattanooga than for the longer haul to Nashville. Both the Circuit Court (Judge Severens) and the Circuit Court of Appeals, which was composed of Mr. Justice Harlan, and Circuit Judges Taft (now President Taft) and Lurton (now Mr. Justice Lurton), upheld the order of the commission, the latter court, speaking through Judge Taft, holding that in fact substantially similar conditions as to competition did exist at Nashville and Chattanooga (99 Fed., 52, 61). But this court held that the carrier had the right at his own risk to determine whether section 4 was applicable; and, inasmuch as the commission had refused to consider the question of fact, which should first be done by that body, this court would not enter into their consideration, and dismissed the bill. But the meaning of the 4th section and its relation to the 3d section were discussed at length; and speaking through Mr. Justice (now Chief Justice) White, the court said:

> It is not difficult to perceive the origin of the fallacy upon which the contention (that competition can not produce a dissimilarity of conditions within the meaning of the 4th section, if a discrimination arises from the less charge for the longer haul) rests. It is found in blending the third and fourth sections in such a manner as necessarily to destroy one by the other instead of construing

them so as to cause them to operate harmoniously. *In a supposed case when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates can not be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply.* The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the *Behlmer* case, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it can not be that the avail-

ing of this right is the cause of the preference and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination.

The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, *that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place,* and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it. *We say seemingly on the one hand and apparently on the other because in the supposed cases the preference is not "undue" or the discrimination "unjust." This is clearly so when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge* (pp. 18, 19).

* * * * *

That, as indicated in the previous opinions of this court, *there may be cases where the carrier can not be allowed to avail of the competitive condition because of the public interests and the*

> *other provisions of the statute, is of course clear. What particular environment may in every case produce this result can not be in advance indicated.* But the suggestion of an obvious case is not inappropriate. Take a case where the carrier can not meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency toward unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places (pp. 19 and 20).

From these decisions of this court, as well as the original construction of section 4 by the commission, it appears that section 4 as originally enacted had no application when two conditions concurred, to wit: (1) When the rate for the shorter haul was within itself reasonable, and (2) when it was necessary for the carrier to charge the lesser rate for the longer haul in order to get the traffic. *It was the presence of both of those elements which rendered the circumstances and conditions substantially dissimilar within the meaning of the section and excluded its application.*

Furthermore, if the lower rate for the longer haul was necessary to get the business, but brought no

returns over expenses, such necessity could not justify the difference in the rates; but it is unnecessary to determine whether in such case the discrimination was prohibited by the 3d or 4th section, as no such conditions are here shown to exist.

It was also necessarily implied and in effect declared, that if a greater rate than the one charged for the longer haul would get the business, though it be not so great as the charge for the shorter haul, *to that extent* the lesser charge for the longer haul was not justified on the ground of substantial dissimilarity.

To state it in another way, if the charge for the shorter haul was unreasonably high, or if the charge for the longer haul could be increased and thus brought nearer an equality with the shorter haul charge, and yet the business be obtained, *to the extent* of the unreasonableness in the one instance and the possible increase in the other, the carrier could not legitimately claim a substantial dissimilarity of conditions; that is, *where and to the extent that the carrier could exercise his volition as to rates, he could not rely upon the circumstances and conditions being substantially dissimilar, and the prohibition of the 4th section to that extent applied.*

Therefore, the commission gave an effect entirely too broad to the decision of this court in the East Tenn., Va. & Ga. Ry. Co. case. It was thereafter the duty of the commission in prosecuting an inquiry under section 4 to ascertain, not only whether there were

conditions of competition at the two points materially different, as whether there were a number of railroads centering at the farther point, or it had the advantage of both water and rail transportation; but also whether, and to what extent, the rates to such point were voluntary and not forced, and whether the rates to the intermediate point were reasonable, and, if not, to what extent unreasonable, and to adjust the one on the basis of necessity and to make the other reasonable.

This being the construction of sections 3 and 4 by this court before section 4 was amended, under the finding of the commission in both the Reno-Phoenix and the Spokane cases, the adjustment of rates sought to be maintained by the carriers was clearly prohibited, because:

First, the carriers have not established that the terminal rates would not be reasonable if applied to the intermediate points.

Commissioner Lane expressly so found in the Reno-Phoenix case (R., p. 129); while Commissioner Prouty went further and found that as to freight originating in zone 1 an application of the terminal rates to the intermediate points would be reasonable, and as to the other zones the difference in rates based on the differentials indicated in the order would be reasonable. (R., pp. 179, 180.)

Second. The present rates to the terminal points are not compelled, but certainly to a great extent are voluntary, and the burden is upon the carriers to show to what extent they are voluntary.

However, the presence of *either* of these elements brings the cases within the provisions of the original 4th section, and prohibits the greater charge for the shorter haul, except in so far as a departure from the rule is permitted by the commission.

IV.

The facts found by the commission certainly establish that the greater charges for the shorter hauls to the intermediate points fixed and sought to be maintained by the carriers create an unjust discrimination within the prohibition of the fourth section as amended.

It is important to keep in mind that the amendment of this section was made especially with reference to the discrimination then existing between the coast and intermountain cities in consequence of the lower charges for the longer hauls to the former than for the shorter hauls to the latter; and that though it had been repeatedly found by the commission and by the courts that there were material differences in the conditions and circumstances of the two localities growing out of the existence of competition at the coast, yet it was thought by Congress that the amendment would accomplish the needed relief.

Counsel for appellees, however, insist that the only effect of striking out the phrase "under substantially similar circumstances and conditions" was to require the carriers to make application for relief, and hence to assume the burden of proof.

But the burden of proof rested upon the carriers before the amendment. In the Louisville & Nashville case, supra, one of the conclusions reached by Judge Cooley was:

> That the judgment of carriers in respect to the circumstances and conditions is not final, but is subject to the authority of the commission and of the courts, to decide whether error has been committed, or whether the statute has been violated. *And in case of complaint for violating the fourth section of the act, the burden of proof is on the carrier to justify any departure from the general rule prescribed by the statute by showing that the circumstances and conditions are substantially dissimilar.* (1 I. C. C. Rep., 291.)

(See also Judson on Interstate Commerce, sec. 293.)

These authorities take the correct view, as the charging of a greater rate for the shorter haul when one haul is embraced in the other clearly makes out a *prima facie* case of unjust discrimination. Then, according to counsel, the only result accomplished by the long debate in Congress and an amendment which was manifestly supposed to substantially change the effect of this long and short haul section was to prevent the carrier from determining in advance for himself whether the section applied to his case.

But it was certainly intended that there should be some change *in the principles by which the rights of the carriers and the opposing localities, and the public generally, should be determined.*

The meaning of section 4 before amended is above discussed in part, but there is another phase in its meaning which is here important. The section not only prohibited the greater charge for the shorter haul when the circumstances and conditions were substantially the same, unless relief was obtained under the proviso, but also by implication *justified such charge where the circumstances and conditions were substantially dissimilar*, as above defined. That is, in declaring that the carrier should not make the greater short-haul charge when the circumstances and conditions were substantially similar, *the statute also implied that the carrier might make, and that the commission should allow it to make, the greater charge for the shorter haul when the circumstances and conditions of the two hauls were substantially dissimilar.* This is clearly shown in the opinion of this court in *East Tennessee, &c., Ry. Co.* v. *I. C. C.*, supra, where it is said that competition which "exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstances and conditions *provided by the statute,*" and "the lesser charge upon which both the assumption of preference and discrimination is predicated is *sanctioned by the statute which causes the competition to give rise to the right to make such lesser charge.*"

Therefore, when this phrase "under substantially similar circumstances and conditions" was stricken out, not only did the prohibition of the statute become effective in the absence of an application for relief by the carrier, *but also this implied right to*

make the greater charge for the shorter haul, when the circumstances and conditions are substantially different, was taken away. Now, the section declares broadly *and unconditionally* that the greater charge for the shorter haul shall not be made unless relief be obtained from the commission. Before, when the shorter haul rate was reasonable within itself, and the longer haul rate was a necessity to get the business, but brought some returns over cost, the carrier had the right, *declared by statute,* to make the discrimination, and no other facts or circumstances could deprive it of that right. Now, as this right which was given the carrier by the omitted phrase no longer exists, we must look elsewhere to ascertain what the commission shall take into consideration in determining whether the discrimination is a just one or not.

It can not be gainsaid that whatever limitation was placed on the commission by the omitted phrase was removed by its omission, and further, that the commission's field of vision was materially narrowed by that phrase.

But under the section as it now reads, when is a greater charge for a shorter haul an unjust discrimination, and what elements shall enter into the determination of the question? Undoubtedly, the same facts and circumstances should be considered as are considered by the commission in passing on a complaint against unjust discrimination brought under section 3. Now, a complaint of a greater charge for a shorter haul which is embraced within the longer

haul is determined by the same principles as a complaint involving a shorter haul, which is not so embraced. The scope of inquiry is just as broad, and every element that is considered in one may also be considered in the other, though one is brought under section 4 and the other under section 3. The advantage to the shipper in the former case is that the carrier must get permission from the commission before he can make the charge, while in the latter case he makes the charge until the commission orders otherwise.

The courts have never undertaken to specify all the elements that may be considered in determining what constitutes undue preference or prejudice; but in *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission* (162 U. S., 197) this court laid down the general principles governing the commission in the following language:

> When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. *The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question.* The same observations are applicable to the fourth section, or the so-called long and short haul provision, and it is unnecessary to repeat them (p. 220).

And again on page 233:

> That, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, *and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment.* That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies *and the welfare of the community which is to receive and consume the commodities are to be considered* (pp. 233, 234).

In *Louisville and Nashville Railroad Company* v. *Behlmer* (175 U. S., 648), which arose out of a complaint filed before the commission by one

Behlmer, a wholesale hay and grain dealer at Summerville, South Carolina, in which he claimed that he was charged more for a shorter haul between Memphis and Summerville than was charged for the longer haul between Memphis and Charleston, and which, therefore, directly involved the 4th section, in determining what the carrier should take into consideration when considering whether he might charge more for the shorter than for the longer haul, this court said:

> It follows that whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First. The absolute command of the statute that all rates shall be just and reasonable and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may in many cases be involved in the determination of whether competition was such as created a substantial dissimilarity of condition. Second. That the competition relied upon be not artificial, or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making the right in every event to be only enjoyed *with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered.* If, then, we were to under-

> take the duty of weighing the evidence in this record, we would be called upon, as a matter of original action, to investigate all these serious considerations which were shut out from view by the commission and were not weighed by the Circuit Court of Appeals, because both the commission and the court erroneously construed the statute (pp. 674, 675).

It conclusively appears, therefore, that since the striking out of the "substantially similar" phrase, the fact that the charge for the shorter haul is reasonable and the charge for the longer haul is forced, but is to some extent remunerative, while very material elements, are not conclusive reasons for allowing the discrimination, and do not impose the legal duty upon the commission to hold the discrimination a just one; but the commission may even in such a case view the whole situation from the standpoints of both localities and the public at large, as well as the carrier, and draw therefrom a conclusion which it deems to be just.

There is no just reason why the commission in the inquiries here involved should have closed their eyes to every circumstance and condition other than whether the charges for the shorter hauls to Spokane and other intermediate points were reasonable within themselves, and whether the rates to the terminals were forced, but to some extent remunerative. *When such facts alone are considered, the inquiry is confined wholly to the welfare of the carriers.* The commission is made to place itself at the carrier's point of view, and to entirely leave out of considera-

tion the interests of the public and the respective interested localities. It is made to hold that the carriers *must* be allowed to charge a reasonable rate to the intermediate points, and *must* be permitted to reduce its rates so as to get the business at the terminals, provided some returns over cost of service are received, regardless of the injury that may thereby be inflicted upon the public or the intermediate points.

Such is not the law since the "substantially dissimilar" clause was stricken out. Conditions may arise under which a carrier may be compelled to reduce its rate below what may be regarded as a reasonable charge in order to avoid unjust discrimination, or when it will not be permitted to reduce its rate to a certain point merely for the purpose of securing business, though it may not be able to procure the business otherwise, and such rate may bring some return above cost.

This question may best be discussed in connection with the circumstances presented in the applications under consideration. Here is a vast territory lying between the Rocky Mountains on the east and the Cascade and Sierras on the west, which contains millions of inhabitants. This region is cut across at different points by seven transcontinental lines of railway, and it contains many cities, through some of which—for instance Spokane—more than one of these lines pass, which of course are at such cities supposed to be competitors. These lines extend from 150 to 500 miles further west, crossing

the mountains and terminating at certain points on the Pacific coast. Nearly all of the manufactured products which supply the inhabitants of this intermountain region are produced in eastern and middle western parts of the United States; and according to business methods prevailing in the United States these products are distributed through wholesale merchants to retailers, and thence to the consumers. It transpires that these transcontinental lines, the appellees herein, if left unhampered can, and they in fact do, control almost absolutely the distribution of these goods, and determine whether they shall be distributed through wholesale merchants living within that region, to whom one would suppose the right of distribution naturally belongs, or by merchants residing at the Pacific terminals.

The products from the east may reach this territory in either of three ways: (1) They may be shipped to the Atlantic coast, thence carried by a circuitous route over the Atlantic and Pacific Oceans, either around the Horn, through the strait, or across Central America to the Pacific terminals, and thence from 150 to 500 miles back east into this territory. As a matter of fact, only about 10 per cent of all the freight moving from the east to the Pacific coast is carried in that way; (2) they may be transported over these transcontinental lines across this region and beyond to the coast, and thence back again; or (3) they may be unloaded on the western trip, and all the expense and time required for the from 300 to 1,000 miles of haul, twice across the mountains, be avoided. If the first

or second method be pursued, the wholesale merchants of the Pacific coast in a very large measure distribute the goods among the retailers of that region; while if the latter be pursued, the distribution is made largely by the wholesalers residing in the intermountain cities. As said, but little freight moves by the first method, and the carriers have heretofore adopted, and they now seek to maintain, the second method. This method gives the wholesale business to the terminal cities on account of the peculiar method of making rates adopted by the carriers. This method may best be illustrated by a concrete example: For carrying a carload containing 20,000 pounds of first-class traffic from any point east of Denver to Sacramento, Cal., the carriers have fixed a rate of $600; for carrying the same traffic from Sacramento to Reno, 154 miles east of Sacramento, the charge is $258. If a merchant at Sacramento procures such a shipment, his goods pass through Reno on to Sacramento, and he pays for the haul $600; while if a merchant in Reno has such a shipment made, his goods stop in Reno and 154 miles of haul is saved, but he pays therefor the $600 rate to the coast plus the $258 rate from Sacramento to Reno, making a total charge of $858. To study the effect of this system upon a Reno merchant, let us suppose a point X, 54 miles west of Reno and 100 miles east of Sacramento, at which a retail merchant resides for whose custom Sacramento and Reno wholesale merchants are competing. Suppose a Sacramento wholesaler sells this merchant at X a carload of first-class traffic. The

freight on that car to X will be $600, the charge to Sacramento, plus the cost of haul back 100 miles to X. But suppose the merchant at X buys from the Reno wholesaler; then the charge will be $600, the rate to Sacramento, plus $258, the rate from Sacramento to Reno, plus the local charge for the 54-mile haul from Reno westward to X. That is, if the goods be bought at Reno, a charge is paid for a haul of 108 miles—twice the distance between Reno and X—which is not paid if the purchase be made at Sacramento. Therefore the Sacramento merchant can undersell the Reno merchant in every mile of territory west of Reno, regardless of the relative distances between such point and Sacramento and Reno, and can compete on an equal footing with the Reno merchant at his own door and in every mile of territory east of Reno. Such a system is *prima facie* a monstrosity, and it is this monstrosity that the carriers seek to perpetuate.

The theory upon which they base their contention is this:

First. As to traffic originating at or near the Atlantic coast, they say that the cheapest line of haul from this territory to the Pacific terminals is by ocean; that this ocean haul of 20,000 pounds of first-class traffic can be made for $600; that, hence, this is the basis to which all carriers to those terminals must conform, or otherwise get no business; that if there were no lines of road connecting Reno with the East, the rate to Reno would be the $600 ocean charge to Sacramento plus the $258 charge by rail

from Sacramento to Reno; that the rate of $858 by rail from the East to Reno is within itself not an overcharge; and that Reno, therefore, gets all the advantage to which it is entitled by the proximity of the ocean, inasmuch as in making up its rate it gets advantage of the cheap ocean rate of $600 to Sacramento.

Second. As to the traffic originating some hundreds of miles back from the Atlantic coast, they say the ocean rates to the Pacific terminals are controlling, because if a materially higher rate should be charged by rail the traffic would flow eastward to the Atlantic, and thence to those terminals.

Third. As to the traffic which originates so far west that it can not take the course last mentioned, as for instance traffic originating at St. Paul, they say that if a rate equally as low is not given from that point to the terminals, its merchants can not sell in competition with those near the Atlantic, and hence no business would originate there.

Therefore, it is claimed that the whole system is thus *absolutely fixed* by the ocean rate, and that the commission can not lawfully interfere therewith, because, first, these carriers can not change that basic rate and retain the terminal business, and the rates to the intermountain points are within themselves reasonable; and, second, the commission can give no consideration to any other element than those two facts.

Is this contention of the carriers based upon justice or reason?

As to traffic originating on or near the Atlantic coast no advantage whatever is given to the intermountain cities because of the construction of these railways connecting them with the East. They are in precisely the same condition they would be if a line of road extended to them from the Pacific coast, and no farther. The conditions are the same, we understand, in those cities which are served with more than one line, except Spokane, which is charged the terminal rate plus about 75 per cent of the back haul. Hence, these additional facilities and the fact that these cities are situated hundreds of miles nearer the origin of traffic, and that the traffic flows through them, are allowed to count for nothing against the coast cities. It is a plain case of imposing the rate because the carriers have the power to do so, when it could be greatly reduced, as has been done to the coast, and yet the carriers realize a greater profit than is derived from the coast rate, because the haul is much shorter, and, therefore, less expensive.

Is there no just and lawful ground of compromise between Reno and Sacramento? If the above mentioned rate to Reno of $858 is reasonable, certainly a reasonable rate over the same line to Sacramento is not less than $900. This rate, then, is the basis from which to start, because the underlying principle of the entire interstate commerce act is that charges for services must be reasonable. Therefore, every dollar's reduction in the rate to Sacramento below $900 is a discrimination against Reno; and when a discrimination reaches the point where

it becomes unjust it can go no farther. The law certainly means that all rates shall be as nearly as possible reasonable, and that there shall be as little discrimination between points on the same line as is reasonably possible. When a carrier, *without compulsion*, creates a difference in rates to equally distant two points, it brings about, within the meaning of the statute, an unjust discrimination. But in prohibiting *unjust* discrimination the statute implies that there is some discrimination which is not unjust, and may be allowed. Hence, the lesser ocean rates at the coast may be permitted to control in a measure the rail rates to those points, and to draw them below what is reasonable *per se;* but at the same time the prohibition against discrimination must be kept in mind; and if it requires a great reduction at Sacramento to meet the competition there and obtain the traffic, such reduction without *some* reduction at Reno would create an unreasonable, and, hence, an unjust discrepancy between the two rates, because if the rate to Reno is reasonable the rate to Sacramento can not be *very* greatly reduced below the Reno rate and *yet bring some returns over cost.* Moreover, if the conditions at Sacramento require a large reduction in rates to that point, then the same conditions will require some reduction at Reno.

But it is said that Reno's position does not entitle it to such a consideration. However, Reno is, in the eye of the law, advantageously situated, because it is located on the same line of road with Sacramento, is 154 miles nearer the origin of traffic than Sacra-

mento, and therefore has the shorter haul over the same line and embraced in the longer haul to Sacramento, and the statute forbids unjust discrimination between the two points, and the welfare of the city demands that the reasonable rate of $900 at Sacramento be not reduced to $600, unless some reasonable reduction be also made at Reno.

Aside from this, the carriers have recognized this very principle in selecting the points at and near the Pacific coast which they favor with the terminal rates. As found by Commissioner Lane, some of these points are 100 miles inland from the coast. (R., p. 123.) Therefore, Reno is only 54 miles farther from the coast than some of these favored points, and yet they get the full reduction of $300 from the reasonable rate, while Reno gets nothing. How can such a reduction for these favored inland cities be justified on any ground other than that to allow it at the coast cities and not to them would ruin their business and constitute an unjust discrimination?

As to the traffic which originates in the Middle West, the discrimination in rates to the terminal and intermediate points is still more clearly inexcusable. This intermountain region would consume the same amount of goods regardless of where they are produced. If the favorable rates which it is claimed are created by ocean competition had been confined to localities on or near the Atlantic coast, all this merchandise would have been manufactured there. Moreover, the merchants on the Pacific would have

had just as many and favorable markets in which to purchase, because the markets which have been created by the railroad policy in the Middle West would have arisen, under the other policy, near the Atlantic coast. Furthermore, these continental lines would have carried the same amount of traffic, and each, through its eastern connections, would have secured its reasonable proportion. Hence, the general policy was not adopted to aid the Pacific coast terminals, *and there was no necessity whatever for granting the same rates to the Middle West points as to those on the Atlantic, and the pretense of forced rates behind which the carriers seek to hide has no application to this very important phase of the situation.* There were two motives by which this policy was inspired: First, it was to the advantage of the western lines, because if the traffic originated with them they retained the pay for the entire haul. This motive was pure selfishness, as they would have received, as they do now receive on traffic originating on the Atlantic, a reasonable compensation for the haul. (See 19 I. C. C. Rep., 162, 172, where examples are given, showing the proportion of the through charges which go to the western carriers.) Second, it was greatly to the advantage of the cities situated in the Middle West, whose phenomenal growth has largely resulted therefrom. And these two motives have stretched that marvelous blanket from the Atlantic coast to Denver, two-thirds of the way across the continent. Here the carriers deliberately said to these middle western cities, *without being moved thereto by any com-*

pelling force arising out of advantage of location or otherwise, that they would aid them in their commercial contest with their eastern rivals. And they now say that this motive to aid these cities, against their competitors, is altogether righteous in the eastern two-thirds of the continent; but that the same motive, which would lend a helping hand to Reno, Spokane, and other struggling cities between the mountains against their powerful rivals on the Pacific, is altogether wrong, and that the statute absolutely excludes it from the vision of the commission. In other words, the carriers claim that there are important considerations which build up and tear down vast industries, and populate or devastate vast stretches of country, which they may consider without restriction when engaged in rate making; but which can not enter the minds of the commission when it is considering the reasonableness of those rates, or whether they are unjustly discriminatory.

The truth, as shown by this entire record, is, that but little attention is given by the carriers to the reasonableness of rates. The discrepancies in the charges for the same services are so vast and varied that it is ridiculous to pretend to justify any one rate on the ground of its being a reasonable compensation for the services rendered. For illustration, take the car of traffic above mentioned. If it starts at Augusta, Maine, and is delivered at Reno, the charge is $858. If it starts at Chicago, *one-third* of the distance across the continent, the rate to Reno is $858. And if it originates at Denver, *two-thirds* of

the way across the continent, the charge to Reno is still $858. And the rate from Sacramento to Reno, though only 154 miles, is $258, or nearly one-third of the entire rate to Reno from the Atlantic side of the continent. And yet it is solemnly suggested to this court that all these rates are *reasonable within themselves*. The absurdity of this suggestion is emphasized by the many and very great changes in rates to the Pacific terminals, as described by Commissioner Lane (R., p. 103), and his finding that "notwithstanding the improved conditions in transportation and the enormous increase in volume of traffic, yet the rate to-day from the Missouri River to the Pacific coast is 90 cents higher, first class; 85 cents, second class; 80 cents, third class, than it was nearly 25 years ago." (R., p. 104.) The exact truth is stated by Commissioner Lane when he says: "*The carriers have competed with each other across a table until their minds agreed upon a condition that would prevent rate wars.*" (R., p. 124.) The commission has spent years in the most painstaking and earnest effort to establish a rule which makes an approach toward doing justice to those inland cities. The conditions are such that it is no doubt impossible to reach exact justice, but beyond question a reasonable approximation has been made; and their efforts should not be set at naught unless their orders very clearly violate some positive provision of the statute.

V.

The court erred in holding that the orders of the commission are void because they attempt to determine the relation of long and short haul rates, irrespective of absolute rates.

The reason urged by counsel and assigned by the Commerce Court why the commission can not fix differentials between the two rates, irrespective of absolute rates, is that the carrier *must* be allowed to reduce the terminal rate to such a point as to get the business, provided it still brings some return over cost of service, and the carrier *must* be allowed to make a charge for the shorter haul reasonable within itself, and that the two rates are, therefore, entirely independent of each other, and hence can not be tied together by a scale of differentials.

This proposition we have above endeavored to refute upon the grounds that the contention is wrong as a proposition of law, but if legally sound has no application to the facts in this case.

The commission is authorized to "from time to time prescribe *the extent* to which such designated carrier may be relieved from the *operation* of this section." The "operation" of the section is to prohibit a greater charge for the shorter than for the longer haul, and the commission is therefore empowered to prescribe *the extent to which the carrier may charge more for the shorter than for the longer haul.* The *extent* mentioned is *the difference between the charges* for the two hauls. When one speaks of the distance or extent between two points, both points must neces-

sarily be kept in mind; and the greatness of the "extent" depends, not upon the *exact*, but upon the *relative*, locations of the two points. Furthermore, this section is a statute against discrimination, which is a term implying relationship between two courses of conduct. In order that there be a discrimination against a person, there must be some other person to whom the act of discrimination is more favorable. Therefore, when the commission is authorized to prescribe the extent of that discrimination, its power is to fix a *relative* course of conduct toward the two.

Here the commission is not specifically authorized to say what either charge shall be. They can not say, unless the power be read into the act by implication, what shall be the charge to Reno or the charge to Sacramento, but they are expressly empowered to say what shall be the *relationship between those charges*. Instead, therefore, of the theory that the carrier can not be prohibited from making such a charge to Sacramento as to get the business, and at the same time from making a reasonable charge to Reno, proving that the commission can not fix differentials between the two rates, the positive language of the statute refutes the correctness of the theory advanced, in that it shows conclusively that the two rates are not independent of each other.

It is suggested by counsel that the extent of relief referred to means extent of territory within which the rates may deviate from the prohibition of the statute, or that different classes of rates may be excepted from its operation. The language is broad enough

to allow such exceptions; and in fact it was so construed by the commission in these cases, and hence the country was divided into zones, and the orders made are applicable to only commodity rates; but certainly the extent of the discrimination in the rates for the longer and shorter hauls is the principal object which Congress had in mind.

Counsel did not choose to advance any course which the commission could legally pursue to comply with this meaning of the statute until the reply brief of the Atchison, Topeka & Santa Fe Railway Company and others was filed in this court (p. 6), wherein it is said "the function of the commission on these applications, if 'extent' has the meaning indicated, is to ascertain what that rate (the minimum rate to the coast which will get the business and yield something over expenses) is, and to permit the carrier to depress its rates at the more remote competitive point *without regard to intermediate rates* (italics theirs) to the lowest point short of the point of undue discrimination." The previous paragraph of the brief shows that by the "point of undue discrimination" is here meant a terminal rate so low that it will pay nothing over expenses.

But there is nothing in the act authorizing the commission to fix any minimum rate unless it be implied in this section; and in *Texas & Pacific R. Co.* v. *I. C. C.*, 162 U. S., 197, it was held that the power to fix a rate must be clearly expressed. But a more conclusive answer to this theory is, that if the rate to the termi-

nals be fixed "without regard to intermediate rates" no *extent* of relief from the operation of the act is prescribed, and there is no compliance, either literally or in spirit, with the terms of the statute. The suggestion is in fact but a reiteration of the theory that the two rates must be absolutely divorced.

VI.

The order is certainly not invalid in so far as it denies permission to the carriers to charge a greater sum for the shorter than for the longer haul within Zone 1.

For the findings of the commission upon this subject see sec. 1, subsecs. 3 and 4.

These findings of fact were conclusive. But the Commerce Court based its holdings as to this zone upon the highly technical ground that the order of the commission was not limited to a denial of the applications "*in the form in which they were presented;* that is, to a denial of the maintenance of the then prevailing rates to the coast concurrently with higher rates to the interior points. It forbids the carrier to maintain *any* coast rate lower than the contemporaneous intermediate rate from these points."

But the statute does not so restrict the power of the commission that it can only say: *If the carrier maintains a specified rate for the longer haul,* he can't charge more than that rate for the shorter haul. It contemplates that the commission can answer that no higher rates can be charged for the shorter haul,

regardless of what the rates actually charged for the longer haul may be. The commission is not governed in considering an application under section 4 by the rates actually charged by a carrier; *they deny or grant the application upon the ground that its allowance will or will not work an unjust discrimination.* Nor is the form of the order material. It is sufficient if the substance is such that the merits of the matter are reached. That the commission should be bound by no technical rules is forcibly expressed in the following language of this court in *Interstate Commerce Commission* v. *C. R. I. & P. Ry. Co.* (218 U. S., 88, 103): "The outlook of the commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it, therefore, are complex and difficult, the means of solving them are as great and adequate as can be provided."

VII.

The order of the commission is not invalid, because the United States is thereby divided into zones, and the relative rates are fixed with reference to such zones.

As a matter of fact, the railroad carriers themselves divided the United States into these same zones. (See statement of Commissioner Prouty, R. 189.) Furthermore, this record shows that they have made a blanket rate to the western terminals

covering half of the United States, which is equivalent to dividing the United States into two zones, and the carriers ask in their application that they be permitted to retain these zones. Certainly, therefore, they stand in no attitude to complain of the establishment of zones when the commission has only increased the number they seek to retain. The blanket-rate system has for many years been in use by the railroad carriers, and its validity was recognized by the Commerce Commission in *Business Men's League of St. Louis* v. *Atchison, Topeka & Santa Fe Railway Co.* (9 I. C. C., 318). If the contention upon this feature is correct, then it would be necessary to make a scale of rates which would gradually increase as the distance increases from the Pacific to the Atlantic coasts. In *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway Co.* (218 U. S., 88, 104), it was intimated, and in effect held by this court, that the creation of zones by the commission did not fall within their power, but the character of zones there under consideration were entirely different from the zones here declared by the commission. There it was insisted that the commission had attempted to apportion out artificially the country into zones tributary to given trade centers and noncontributary to others; that is, that they had adjusted rates in such a way as to secure the trade of certain localities for certain trade centers without reference to the reasonableness of rates.

VIII.

The orders of the commission are not void on the ground that they do not dispose of special cases within the meaning of the proviso.

It appears to have been the view of Judge Archbald that the territory under consideration was too large, and the points involved were too numerous for these applications to present special cases within the meaning of the statute, and that, therefore, the proceedings and orders of the commission were not only irregular, but were absolutely void.

In the first place, no rule as to what constitutes a special case can well be laid down, but each application has to be considered with relation to its peculiar circumstances. Here was a peculiar situation. A number of complaints had been previously presented to the commission, and every phase of the situation and all the circumstances applicable to every part of the territory involved had been carefully examined and considered by the commission. While a number of transcontinental lines were involved, yet practically the same conditions and circumstances applied to each, and a determination of the matter as to one line was substantially a determination as to all. The same may be said with reference to the various points on each line. When it was determined what the relative rates should be between one interior point and a terminal, it was a determination what the relative rates should be between all the interior points and terminals.

But a fact which should be taken as conclusive against the carriers is that *they presented their applications precisely as they were considered and determined by the commission.* That is, in their applications they presented rates in bulk applying to all points on a number of lines, and asked the commission to consider all these rates together. To these invitations the commission responded in the same manner in which they were presented, and passed its orders accordingly. Now, certainly these carriers can not take advantage of their own mistake, if one was committed. They can not insist that orders based upon these applications and following them precisely are void, and at the same time insist that the applications themselves are valid. As was said by this court in *Interstate Commerce Commission* v. *C. R. I. & P. Ry. Co.* (218 U. S., 89, 109), in referring to an attack made by the carriers upon an order of the commission based on a condition which they had created, "It is somewhat strange that that which was done in the interest of the carriers should be brought forward by them to attack the action of the commission."

But if the applications are void, then the statute became obligatory upon the expiration of the six months' time allowed by the statute for the presentation of applications, and the Commerce Court is without power to enjoin the operation of the statute.

IX.

The allegations of the petitions wholly fail to show that the carriers have been deprived of their property without due process of law within the meaning of the Constitution.

The allegations of the petition in case No. 480 upon this point are contained in paragraphs 16, 17, 18, and 20, and are as follows:

Paragraph 16 reads:

> Assuming said section 4 of said act to regulate commerce as amended by said act of June 18, 1910, to be a constitutional enactment, the order of the commission of July 31, 1911, deprives your petitioners of their constitutional right to engage in the business of carrying traffic to said Pacific coast terminals, in that it forces your petitioners either to forego said traffic or to obtain the same at the expense of lowering their rates to intermediate and other interior points so as to make said rates to said points less than your petitioners are rightfully entitled to receive, *and unless said order of July 31, 1911, shall be set aside and annulled by this court, your petitioners can continue in the business of carrying traffic to said Pacific coast terminals only by reducing all rates to intermediate territory to a point where the same shall be less than your petitioners are rightfully entitled to receive.*

In paragraph 17 it is alleged that while petitioners may continue to charge reasonable rates to the

interior points, they can only do so by raising rates to the terminals, and—

> That to so raise their rates to Pacific coast terminals would make such Pacific coast terminal rates greatly in excess of the competitive rates to said terminals hereinabove described and would cause to be diverted to the water carriers and lost to your petitioners practically all of the traffic now moving over the lines of your petitioners to said Pacific coast terminals, and while this effect would not be immediate because the number of vessels now available for this service is not sufficient to carry the whole of such traffic, *such an advance would result in the immediate loss to your petitioners of a large part of said terminal traffic and in the ultimate loss of practically the whole thereof as soon as vessels could be built and equipped to carry the same.*

In paragraph 18 it is alleged that the present rates to the terminals bring some remuneration over cost, and that the order of the commission—

> *in requiring your petitioners to forego said terminal business or to reduce their rates to interior points below the just and reasonable rates which they are entitled to charge will result in the taking of your petitioners' property without due process of law and is confiscatory and void;*

and that if they should comply with the order by depressing rates to intermediate points so that they

should not exceed the per cent above rates to the terminals as required—

> your petitioners would be required to accept the business moving to interior points at rates so low that the entire revenue therefrom, together with all other revenues accruing to your petitioners, *would not be a fair return upon the fair value of your petitioners' property devoted to the public service.*

In paragraph 20 it is alleged that—

> To comply with the order of the commission upon said applications your petitioners will be obliged to readjust rates now in effect from Missouri River territory and all points east thereof, either by raising rates to said terminal points and thus diverting and losing terminal traffic to competitive water carriers or by lowering rates to intermediate and other interior points upon their respective lines to less than reasonable rates, and will be forced to move traffic in accordance with such changed rates *and will lose a large amount of revenue to which they are lawfully entitled and which they will be unable thereafter to demand or collect.*

The allegations of the petition in case No. 481 on this subject are contained in sections 16 and 18, and while not so extended as the allegations in the petition in No. 480, they are in effect the same.

The petitions, therefore, contain no statement showing the amount the companies receive from the present rates, or how much they would receive

if the order of the commission were put into effect, or the amount of profits that is now realized by the carriers on their investment, or the amount they would receive provided the order of the commission were enforced. They, by implication, admit that under rates which would comply with the commission's orders they would make a profit, but allege no facts by which even the proximate amount of such profit can be estimated, declaring only that the revenues they would receive "would not be a fair return upon the fair value of your petitioners' property devoted to the public service." The judgments of different persons as to what constitutes a fair return upon one's investment are quite diverse. One person may believe that 4 per cent or even 3 per cent on an investment of many millions is a very reasonable return, while others may take the view that nothing less than 10 per cent is a fair return, and that even 15 or 20 per cent would not be unreasonable. The reports of the commission rather indicate that petitioners belong to this latter class. The various cases decided by this court in which the question as to what constitutes a confiscation of property by reduction of the amount of a company's income was summarized by Mr. Justice Moody, speaking for the court, in *Knoxville* v. *Knoxville Water Company* (212 U. S., 1), in the following language:

> It can not be doubted that in a *clear case of confiscation* it is the right and duty of the

court to annul the law. Thus in *Reagan* v. *Farmers' Loan & Trust Company* (154 U. S., 362), where the property was worth more than its capitalization, and upon the admitted facts the rates prescribed would not pay one-half the interest on the bonded debt; in *Covington, etc., Turnpike Co.* v. *Sandford* (164 U. S., 578), where the rates prescribed would not even pay operating expenses; in *Smyth* v. *Ames* (169 U. S., 466), where the rates prescribed left substantially nothing over operating expenses and cost of service; and in *Ex parte Young, supra*, where, on the aspect of the case which was before the court, it was not disputed that the rates prescribed were, in fact, confiscatory, injunctions were severally sustained. But the case before us is not a case of this kind. Upon any aspect of the evidence the company is certain to obtain a substantial net revenue under the operation of the ordinance. The net income, in any event, would be substantially 6 per cent, or 4 per cent after an allowance of 2 per cent for depreciation. (See *Stanislaus County* v. *San Joaquin Company*, 192 U. S., 201.) We can not know clearly that the revenue would not much exceed that return. We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation. Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculations as to its effect, based upon the operations of a prior

> fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. *It is enough that the whole case leaves us in grave doubt* (pp. 17, 18).

If these cases were put at issue, and the evidence introduced on behalf of the carriers left them in precisely the same condition in which they are presented in these petitions, the court would necessarily refuse to hold that there had been any confiscation of property by these orders of the commission; and certainly a defect which would be fatal in the evidence is fatal in the allegations of an original bill or petition.

Furthermore, in No. 480, the joint petition was filed by seventeen railroad companies; in No. 481 the joint petition was filed by eleven railroad companies. The two petitions embrace all the lines extending from the Great Lakes to the Pacific Ocean, including lines in the Dominion of Canada. Courts take judicial notice of the existence, location, and operation of railroads. (16 Cyc., 861.) The proposition that the joint properties of all the companies owning and operating half of the railway mileage of the United States will be confiscated by the orders of the commission, if allowed to become effective, can not successfully be maintained by oaths supporting such general allegations as are contained in these petitions.

X.

The Court of Commerce had no power in its final decree to enjoin the Government officials from prosecuting the carriers for a violation of the 4th section of the statute, or to in any way exempt the carriers from criminal liability under that section.

In re Sawyer (124 U. S., 200, 210, 211) this court used the following language:

> The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the Government.

But the court also said:

> The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.

It has also been held that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be

reached and controlled by a court of equity. (*Davis & Farnum Manufacturing Co.* v. *Los Angeles*, 189 U. S., 207, 218; *Dobbins* v. *Los Angeles*, 195 U. S., 223, 241.) Those cases involved the validity under the 14th amendment to the Constitution of certain city ordinances. The cases on the general subject are collated in a note to *Crighto* v. *Dahmer* (Miss.), (21 L. R. A., 84).

This action of the court in the present case was erroneous, for the following reasons:

1. There is no case in which a court of equity can enjoin or interfere with the United States in its sovereign duty of enforcing its criminal laws. A contrary rule would be fraught with grave danger, as a statute essential to the public welfare might be held suspended for an indefinite time, and until many offenses had been barred by the statutes of limitation, awaiting a decision of this court. If a criminal statute is void, the defendant has a complete defense to the prosecution.

2. No such jurisdiction is vested in the Commerce Court.

It may, under section 3 of the act creating that court (act of June 18, 1910, ch. 309, 36 Stat. L., 542), when the circumstances justify it, "enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission," but there is no suggestion that it may suspend or annul any legislation by Congress, and much less criminal legislation; and if petitioners be prosecuted it must be under the provisions of the act and not under the order of

the commission. Again, the power to enjoin an order of the commission certainly does not imply the power to enjoin a criminal prosecution before another court.

3. The injunctive order in this respect was wholly gratuitous.

It is not alleged that any criminal proceedings or proceedings to collect penalties are contemplated, and there are no allegations in the petitions upon which it can rest, nor in fact was any such relief prayed for.

XI.

Section 4 of the interstate commerce act is not unconstitutional on the ground that it undertakes to vest in the Interstate Commerce Commission legislative power.

The contention of the carriers is that Congress has undertaken by the first proviso in this section to leave it to the commission to determine arbitrarily and without the exercise of a proper discretion whether in any given case the carrier may be relieved from the general rule of the 4th section, and if relieved at all, to what extent, and that, therefore, the entire section is unconstitutional.

This contention can not be sustained for the following reasons:

1. *The first proviso of the 4th section does not undertake to vest an arbitrary power in the commission, but requires them to investigate and exercise a sound discretion in determining whether an applicant shall be relieved from the provisions of the section; and*

hence, if no rule for the guidance of the commission in acting under this proviso were found in other sections of the act, this section would be constitutional.

The language of the proviso is that "Upon application to the Interstate Commerce Commission such common carrier may in special cases, *after investigation,* be authorized by the commission to charge less for longer than for shorter distances, etc."

The commission is, therefore, positively required when application is made to *make an investigation* and thereafter to determine whether the relief shall be granted, and if so to what extent, and its power can not, therefore, be exercised arbitrarily or capriciously. That this is sufficient to maintain the constitutionality of this section is shown by the following authorities:

A case specially relied upon by counsel is *Yick Wo* v. *Hopkins* (118 U. S., 356). In that case by an ordinance of San Francisco it was provided:

> SEC. 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone (p. 357).

It appeared that Yick Wo had been found guilty under this ordinance and adjudged to pay a fine of $10.00, and in default of same was imprisoned;

and he sued out a writ of habeas corpus to obtain relief from this imprisonment. It also appeared that about 200 Chinamen had applied to the board of supervisors for permission to carry on their business in wooden buildings, neither of which applications had been allowed, while on the other hand about 80 Caucasians had on application been permitted to do the very thing which the Chinamen had been excluded from doing. The Supreme Court of California held that this ordinance vested in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries. This court, however, refused to take that view, but said, "They (the ordinances) seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons;" and again, "The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." The court, however, based the invalidity of the ordinances upon the provisions of the 14th section, which prohibits a State from denying to any person within its jurisdiction the equal protection of the laws. The clear implication of the language of the court is, that if the board of supervisors had been required to exercise, after

due investigation and consideration, a sound discretion, the ordinance would have been valid.

The case of *Wayman* v. *Southard* (10 Wheaton, 41, 42) involved the validity of a rule of court. The act of 1792 subjected the modes of proceeding under the laws of the State "to such alterations and additions as the said courts, respectively, shall, in their discretion, deem expedient;" and a rule of the court adopted under this provision, and upon which the validity of an execution depended, was attacked as being invalid, in that Congress had undertaken by this act to vest in the court a legislative power. With respect to this question, the court, speaking through Chief Justice Marshall, said:

> It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going further for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the judiciary act and the 7th section of the additional act empower the courts, respectively, to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example, may make rules directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these

> things might not be done by the legislature without the intervention of the courts; yet it is not alleged that the power may not be conferred on the judicial department.
>
> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details (pp. 42, 43).

By section 1547, R. S., it is provided:

> The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner.

This section was taken from the act of July 14, 1862, chapter 164, section 5; 12 Stat., 565, and on April 15, 1870, certain regulations were adopted by the Secretary of the Navy.

Ex Parte Reed (10 Otto, 13–23), was a case which involved the validity of a sentence of a court martial which had proceeded under regulations adopted in pursuance of the statute. The court held that the proceedings were regular. It will be observed that while regulations which had been adopted by the Secretary under a prior act were recognized as valid by this legislation, as to adopting future regulations no rule was enacted for the guidance of the Secretary.

Yet the power of the Secretary of the Navy to make regulations under this statute has been recognized repeatedly by this court.

The rules and regulations adopted for the guidance of the Land Office in the administration of the land laws and the repeated decisions of this court sustaining the same, also support the contention of the United States. The statutory authority for the adoption of such regulations is found in the following statutes:

Section 441, R. S.:

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
>
> * * * * *
>
> Second. The public lands, including mines.
>
> * * * * *

Section 453, R. S.:

> The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

Section 2478, R. S.:

> The Commissioner of the General Land Office, under the direction of the Secretary

> of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

These statutes upon their face lay down no rule for the guidance of the Secretary in prescribing the regulations provided for therein, but the character of the regulations appear to be left entirely to his discretion. The case of *Cosmos Co.* v. *Gray Eagle Co.* (190 U. S., 301) involved the validity of certain rules of the Land Office, but the court held that under the foregoing statutes that office has the power to make rules and regulations; and the validity of such regulations has been recognized in numerous other cases.

The case of *Butte City Water Co.* v. *Baker* (196 U. S., 119) was an action of ejectment, which involved the validity of regulations passed by the Legislature of the State of Montana. Section 2338, R. S., reads:

> As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

No direction whatever is here given to the legislature as to how it shall proceed, and what it shall take into consideration in adopting the rules provided for.

Article IV, section 3, clause 2, of the Constitution provides that—

> The Congress shall have Power to dispose of and make all Needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *

This provision expressly places in Congress all power of disposition of public lands of the United States; and yet it was held in the above-cited case that Congress had the power to delegate to the Legislature of Montana certain limited authority to prescribe rules and regulations with reference to the disposition of lands within its borders; and that, although the statute delegating the power contained no directions as to how it should be exercised, the regulations adopted by the legislature were valid.

A late case decided by this court is that of *United States* v. *Grimaud* (220 U. S., 506). The defendants in that case were indicted for grazing sheep on a forest reserve without having obtained the permission required by regulations adopted by the Secretary of Agriculture. A demurrer was filed to the indictment on the ground that the statute which purported to vest in the Secretary power to adopt such regulations was void because Congress had attempted to vest in him legislative power. This view was sustained by the court below, and the indictment was quashed. The statute under which the Secretary was acting provided that "he may

make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as provided in Rev. Stat., section 5388." The case was twice considered by this court, and when it was finally disposed of the court unanimously held that the act was constitutional, and the regulation was valid.

Many other authorities of a like character might be cited, but these decisions of this court clearly sustain the view, that when a body which is performing only a quasi-legislative function is required to investigate before acting, such body can not act arbitrarily and capriciously, but must exercise a sound discretion, and that a law delegating such power is constitutional.

The power delegated to the commission by the 4th section is only quasi-legislative. The general rule is declared by Congress, but whether or not an exception shall be made in a particular case involves many facts with which Congress can not possibly be familiar, and which must be ascertained by special inquiry, and hence such a question is peculiarly one to be delegated to a body clothed with the power and so organized as to make a proper investigation.

2. *The 4th section must be read in conjunction with the 1st and 3d sections, and the principles declared*

in those sections constitute a rule of action for the commission in making their investigation and decision under the 4th section.

It was not denied by the carriers in the court below that if a rule of action, such as that contained in either the 1st or 3d sections, applied to the commission in acting under the 4th section, the latter section would be constitutional. But it was insisted, first, that the 1st section could constitute no such rule, because the rates which the carrier is seeking to charge when application is made for relief from the 4th section are confessedly less than reasonable, and hence that a requirement that rates shall be reasonable can not serve as a guide to the commission in fixing rates which must be unreasonable; and, second, that the 3d section, which prohibits undue and unjust discrimination, can be no guide for the commission, because in *East Tennessee, Virginia and Georgia Railway Company* v. *Interstate Commerce Commission* (181 U. S., 1) this court held that a rate which is forced below a reasonable rate by competition is not an unjust rate within the meaning of section 3, and that the prohibition of an unjust rate can not be taken as a rule for the fixing of a rate which this court has said is not unjust. In response to these contentions we say:

(a) *In the cases wherein this court construed section 4 before amended by the act of 1910, it was recognized that sections 1, 3, and 4 should all be construed*

together, and that the principles declared in the 1st and 3d sections should be kept in view by the commission in determining questions arising under section 4.

In *Interstate Commerce Commission* v. *Alabama Midland Railway Company, supra,* after holding that competition for traffic between rival lines should be considered in determining whether the circumstances and conditions at the two points were substantially dissimilar, this court said:

> In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the *third and fourth* sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions" (p. 167).

In *Louisville & Nashville Railroad Company* v. *Behlmer, supra,* which was a case brought by Behlmer to enforce an order made under the 4th section, in speaking of what the carrier should consider in deciding whether that section was applicable, this court said:

> It follows that whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar cir-

> cumstances and conditions, his right to do so is governed by the following principles: First. *The absolute command of the statute that all rates shall be just and reasonable, and that no undue discrimination be brought about*, though, in the nature of things, this latter consideration may in many cases be involved in the determination of whether competition was such as created a substantial dissimilarity of condition (p. 674).

In *East Tennessee, Virginia & Georgia Railroad Co.* v. *Interstate Commerce Commission, supra*, another case involving the 4th section before the amendment of June 18, 1910, the court said:

> *True it is that all of the provisions of the statute must be interpreted together*, and because this is the elementary rule the argument now pressed upon our attention is unsound (p. 17).

And again:

> It is not difficult to perceive the origin of the fallacy upon which the contention rests. *It is found in blending the third and fourth sections in such a manner as necessarily to destroy one by the other instead of construing them so as to operate harmoniously* (p. 18).

This court has, therefore, all the time held that sections 1, 3, and 4 should be read together. It was likewise so understood by those members of Congress who were most familiar with the subject when the amendment was made. When Senator Elkins reported the bill approved, June 18, 1910,

from the conference committee to the Senate, concerning section 4, he said:

> In connection with the adoption of the general language of the House amendment concerning the granting of relief by the commission, and the omission of the specific rules contained in the Senate amendment, it is pertinent to observe that the general rules requiring rates to be reasonable and without discrimination are found in sections 1 and 3 of the interstate commerce act. It is also pertinent to note that under the interpretation placed upon section 3 of the act by the Supreme Court it is proper for the commission, in determining whether rates are discriminatory, to take into consideration the fact that there are dissimilar circumstances resulting from competition by rail or water. (Cong. Rec., p. 8239, vol. 45, pt. 8.)

(b) *The amendment of June 18, 1910, did not alter the principles which guided the commission while acting under the proviso of section 4; and there is no such inconsistency between sections 1, 3, and 4 as necessitates a departure from the general rule that all sections of an act must be read together.*

Under section 4, before amended, the carrier had the right to determine for himself whether or not the circumstances and conditions at the two points were substantially dissimilar; and if complaint were made to the commission, the first question presented was whether or not the circumstances and conditions were substantially dis-

similar; and if they were, that was the end of the matter. But, as heretofore shown, it was necessary, in order to establish such substantial dissimilarity, that the rate for the longer haul be *forced* and that the rate for the shorter haul be reasonable. And, even then, a longer-haul rate would not be permitted unless it brought some returns above cost of service. These conditions, however, were not specified in the statute, but were held as necessarily implied from the prohibition against unjust discrimination in section 3 and the requirement that rates be reasonable in section 1. Hence, in determining the preliminary question whether the circumstances and conditions at the two points were substantially similar, the commission was guided by the provisions of sections 1 and 3.

But when the commission found that the circumstances and conditions were substantially similar, could it then in any case have permitted the carrier to charge a greater sum for the shorter than for the longer haul? Undoubtedly, circumstances might have existed when such permission could have been granted, as for illustration, where a carrier charged larger single fares for a shorter haul than for fares to a number of persons in a body for a longer haul. (*Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S., 263.) If there were not, then the proviso to section 4 meant absolutely nothing, because the section had no application where the circumstances and conditions were

substantially dissimilar, and if no relief could be granted when they were substantially similar, then no circumstances could exist to which the proviso could be applied. While the "substantially similar" phrase reduced the scope of inquiry under the *proviso* into narrow limits, yet it certainly was intended to and did apply to some state of circumstances that might be found to exist.

If, then, the commission found the conditions at the nearer and more distant points substantially similar, but yet found that the circumstances were such as to warrant a further investigation, by what rule would they proceed to determine whether the relief should be granted? Most certainly by the principles laid down in sections 1 and 3, keeping in mind continually the reasonableness of the charges to both points and whether unjustly discriminatory. This is clearly implied in all the decisions of this court, there not being an intimation therein to the contrary. In fact, the constitutionality of section 4 was, before the amendment of 1910, so far as we are aware, never questioned, but has been repeatedly recognized by this court.

Then what change was wrought by the amendment which renders it unconstitutional?

It was insisted by counsel for the carriers that the phrase "under substantially similar circumstances and conditions" constituted a rule of action for the control of the commission, and hence that the constitutionality of section 4, as originally enacted, was thereby saved. But that phrase

constituted no rule for the guidance of the commission *while acting under the proviso of section 4. It prescribed a condition precedent to the exercise of the power at all.* If the circumstances and conditions were substantially dissimilar, the commission was vested with no power to act *under the proviso;* but if they were substantially similar, then the commission could act. What, then, was the effect, as bearing upon this question, of eliminating this phrase from the section? In the first place, it rendered the requirement that no greater charge be made for a shorter than for a longer haul absolute, unless recourse be had under the proviso to the commission, a result which is here immaterial; and in the second place, it removed the right implied from the presence of the phrase that the carrier might charge, *in all cases* where the longer haul was forced, but to some extent remunerative, and the shorter haul was reasonable, more for the shorter than for the longer haul, and thus broadened the scope of the inquiry by the commission, *requiring them to take into consideration every fact and circumstance having a bearing upon the question whether the greater charge for the shorter haul is an unjust discrimination and prohibited by the principles declared in the first and third sections.*

As heretofore shown, there is no such inconsistency between the first, third, and fourth sections as prevents them from being construed together. The two questions which must be kept in mind by the commission in passing on all rates, regardless

of the section under which the inquiry is made, are whether the rates are reasonable and whether they discriminate against any person or locality. As competition may compel the carrier to reduce its rate below a reasonable charge, so likewise it may be required that the rate be reduced to avoid unjust discrimination. Though neither wind nor current may be traveling in the right direction and may be opposed to each other, yet the two are neutralized by the sails and made to propel the boat upon the desired course; so the two requirements that rates shall be reasonable and that there must be no unjust discrimination, as applicable to a particular state of facts, may be apparently antagonistic, yet it is the duty of the commission to neutralize the two, and thus do justice to all persons concerned.

According to contention of counsel the section is invalid *because no precise rule of action is prescribed*, the apparent contention being that *no* discretion can be allowed the commission, but that it was necessary for Congress to point out what should be done under a particular state of facts, and that those facts should conform to the facts in the particular case under consideration.

The cases above cited in which the validity of the delegation of quasi-legislative power was sustained show how erroneous such a view is. Courts are supposed to decide cases in conformity with well-established principles of law, yet there is in most cases a very broad latitude for the exercise of a judicial discretion. The word discretion, when so used, does not

imply the use to any extent of an arbitrary will, but it means that the court must consider each of the many principles bearing upon the questions presented, some of which may be in apparent conflict, and determine what weight, under the facts, shall be given to each. So here, the commission is necessarily clothed with a discretion which in a case so complicated as the ones here under consideration must be a broad one; but the rule by which they are guided is that they must not permit an unjust discrimination against the intermountain points, although in deciding that question they must consider every other principle of rate making which has a material bearing thereon and the interests of all parties and localities concerned. If the commission can not be clothed with such power, it can be nothing more than a mere ministerial body, and can perform but few functions of material value.

For the foregoing reasons it is insisted that the decrees of the Commerce Court should be reversed, the injunctions should be dissolved, and the petitions dismissed.

GEORGE W. WICKERSHAM,
Attorney General.

JAMES A. FOWLER,
Assistant to the Attorney General.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

SEPTEMBER, 1912.

53872—12——8

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, et al., appellants, *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al., appellees.	In Equity. Nos. 883 and 928.
THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, et al., appellants, *v.* UNION PACIFIC RAILROAD COMPANY et al., appellees.	In Equity. Nos. 884 and 929.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

These cases come here by appeal from interlocutory and final decrees of the Commerce Court enjoining enforcement of two orders of the Interstate Commerce Commission.

24763—12——1

The order in Nos. 883 and 928 is dated July 31, 1911, and the body of that order reads:

FOURTH SECTION ORDER NO. 124.

In the matter of the applications, Nos. 205, 342, 343, 344, 349, 350, and 352, on behalf of the Transcontinental Freight Bureau, by R. H. Countiss, agent, for relief from the provisions of the fourth section of the act to regulate commerce as amended June 18, 1910, with respect to rates made from eastern points of shipment which are higher to intermediate points than to Pacific coast terminals.

COMMODITY RATES.

These applications, as above numbered, on behalf of the Transcontinental Freight Bureau, ask for authority to continue rates from eastern points of shipment which are higher to intermediate points in Canada and in the States of Arizona, New Mexico, Idaho, California, Montana, Nevada, Oregon, Utah, and Washington, and other States east thereof, than to Pacific coast terminals.

Full investigation of the matters and things involved in these petitions, in so far as they concern west-bound commodity rates, having been had,

It is ordered, That, for the purposes of the disposition of these applications, the United States shall be divided into five zones, as described in the following manner:

(The transcontinental groups hereinafter described are as specified in R. H. Countiss,

Agent's, Transcontinental Tariff I. C. C. No. 929.)

Zone No. 1 comprises all that portion of the United States lying west of a line called Line No. 1, which extends in a general southerly direction from a point immediately east of Grand Portage, Minn.; thence southwesterly, along the northwestern shore of Lake Superior, to a point immediately east of Superior, Wis.; thence southerly, along the eastern boundary of Transcontinental Group F, to the intersection of the Arkansas and Oklahoma State line; thence along the west side of the Kansas City Southern Railway to the Gulf of Mexico.

Zone No. 2 embraces all territory in the United States lying east of Line No. 1 and west of a line called Line No. 2, which begins at the international boundary between the United States and Canada, immediately west of Cockburn Island, in Lake Huron; passes westerly through the Straits of Mackinaw; southerly, through Lake Michigan to its southern boundary; follows the west boundary of Transcontinental Group C to Paducah, Ky.; thence follows the east side of the Illinois Central Railroad to the southern boundary of Transcontinental Group C; thence follows the east boundary of Group C to the Gulf of Mexico.

Zone No. 3 embraces all territory in the United States lying east of line No. 2 and north of the south boundary of Transcontinental Group C, and on and west of line No. 3, which is the Buffalo-Pittsburg line from

Buffalo, N. Y., to Wheeling, W. Va., marking the western boundary of Trunk Line Freight Association territory; thence follows the Ohio River to Huntington, W. Va.

Zone No. 4 embraces all territory in the United States east of line No. 3 and north of the south boundary of Transcontinental Group C.

Zone No. 5 embraces all territory south and east of Transcontinental Group C.

It is further ordered, (1) That those portions of the above-numbered applications that request authority to maintain higher commodity rates from points in zone No. 1 to intermediate points than to Pacific coast terminals be, and the same are hereby, denied, effective November 15, 1911; (2) that petitioners herein be, and they are hereby, authorized to establish and maintain, effective November 15, 1911, commodity rates from all points in zones numbered 2, 3, and 4, as above defined, to points intermediate to Pacific coast terminals that are higher to intermediate points than to Pacific coast terminals; provided that the rates to intermediate points from points in zones numbered 2, 3, and 4 shall not exceed the rates on the same commodities from the same points of origin to the Pacific coast terminals by more than 7 per cent from points in zone No. 2, 15 per cent from points in zone No. 3, and 25 per cent from points in zone No. 4.

The Commission does not hereby approve any rates that may be established under this

authority, all such rates being subject to complaint, investigation, and correction if they conflict with any other provisions of the act. (Rec., No. 883, pp. 33–35.)

The order in Nos. 884 and 929 is dated June 22, 1911, and, aside from matter pertaining to zones, the material portion of the body of the order is:

It is further ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist on or before the 15th day of November, 1911, and for a period of not less than two years thereafter abstain, from maintaining rates from points of origin in Zone No. 1 to Spokane and Walla Walla, in the State of Washington, and to La Grande, Baker City, and Pendleton, in the State of Oregon, which are higher than those contemporaneously maintained from the same points of origin to Pacific coast terminals; from points of origin in Zone No. 2 such rates to the above intermediate points shall not exceed those to Pacific coast terminals by more than 7 per cent; from points of origin in Zone No. 3 said intermediate rates shall not exceed the terminal rates by more than 15 per cent; from points of origin in Zone No. 4 by not more than 25 per cent; and that no order be now made as to Zone No. 5.

And it is further ordered, That this case be reserved for such further order upon the present findings, or for such further investigation, as may be necessary to secure to the complaining localities above specified just

and lawful rates, if in view of the rates established in accordance with this order further proceedings seem necessary. (Rec., No. 884, pp. 20–23.)

The zones mentioned in the order in Nos. 884 and 929 are the same as those described in the order in Nos. 883 and 928.

The orders were made by the Commission under circumstances which may be briefly described as follows:

By the act of June 18, 1910, known as the Mann-Elkins Law, section 4 of the act to regulate commerce was amended, and as so amended reads:

> SEC. 4 (*as amended June 18, 1910*). That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line *or route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act;* but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the *Interstate Commerce Commission* such common carrier may in special cases, after investigation, be

authorized *by the Commission* to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided, further, That no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.*

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition. (Rec., No. 883, pp. 71–72.)

The italics used above indicate the new matter inserted in section 4 by the amendment referred to.

Subsequent to the passage of the amendatory act, carriers engaged in the transportation of freight articles from points of origin adjacent to and east of the Missouri River to destination points on the

Pacific coast and to points intermediate between the Missouri River and the Pacific coast, who had previously published and filed tariffs wherein and whereby it was provided that the rates exacted for such transportation should be greater for the hauls to the intermediate points than for the longer hauls over the same lines in the same direction and through the intermediate points to said destinations on the Pacific coast, applied to the Commission for relief from the rule of the fourth section, which prohibits such discrimination. Whereupon the Commission made a thorough and exhaustive investigation in the premises, and as a result thereof made a report wherein, among other things, it said:

> The carriers herein involved have not shown that undue discrimination was not effected by their rate adjustment between points in Nevada and points in California, nor have they established that the rates to the coast cities, if extended by them from eastern points outside the zone of water influence, are not fully compensatory.
>
> We desire to be extremely conservative in this the first application of the new law, and to require an adjustment of rates that will be safely within the zone of our discretion. For this reason we have decided that the transcontinental carriers serving Reno and other points upon the main line of the Central Pacific shall make no higher charge upon any article carrying a commodity rate than is contemporaneously in effect from Missouri River points, such as Omaha and

Kansas City, to coast terminal points. This principle we shall also expect to be applied on commodity rates to all main-line intermediate points in Nevada and California. Traffic originating at Chicago and in Chicago territory moving under commodity rates may have a rate seven (7) per cent higher than that imposed on freight originating in Chicago and Chicago territory and destined to the coast terminals. From Buffalo-Pittsburg territory the rates to intermediate points may rise above those demanded and charged from the same points and territory to the coast terminals to the extent of fifteen (15) per cent, while from New York and trunk line territory the rates charged shall not exceed twenty-five (25) per cent over and above terminal rates. This means that Suisun, Auburn, Truckee, Reno, and Elko, for instance, points intermediate to San Francisco from the east, shall have at least the benefit of the commodity rates extended from the Missouri River to Sacramento and San Francisco, and shall pay no more than seven (7) per cent above the Chicago-coast terminal rates, and corresponding increases of fifteen (15) and twenty-five (25) per cent, respectively, from Pittsburg and New York territories.

Some of the petitions under the fourth section which have been considered are made by carriers reaching California terminals through the southern gateways, southern Nevada and Arizona. These applications are also denied in so far as they involve the

> imposition of higher rates upon intermediate points than are applied on commodities from the Missouri River to Los Angeles, San Francisco, or other coast terminals. To all such intermediate points [Ashfork, Maricopa, San Bernardino, Bakersfield, Fresno, and Ventura, for instance] terminal rates shall not be exceeded as from Missouri River points, with the same proportionate advances east of the Missouri River as heretofore specified. (Rec., No. 883, pp. 129–130.)

And in accordance with said report the Commission entered the order of July 31, 1911, granting in part and refusing in part the relief asked for by the carriers as aforesaid.

At the time the matters involved in said applications were under investigation the Commission was also investigating a complaint prosecuted before it on behalf of the cities of Spokane and Walla Walla, in the State of Washington, and La Grande, Baker City, and Pendleton, in the State of Oregon. In this complaint it was alleged that the rates exacted by certain carriers for transporting freight articles from eastern points of origin to the destination points last above named as compared with the rates contemporaneously exacted by such carriers for the transportation of like freight articles over the same lines in the same direction through Spokane, Walla Walla, La Grande, Baker City, and Pendleton to destinations on the Pacific coast were in violation of said section 4.

After granting to the parties the full hearing provided for by section 15 of the act, the Commission made a report wherein it stated that the discrimination complained of was unjustly discriminatory and a violation of section 4 of the act as amended by the act of June 18, 1910, as aforesaid (Rec., No. 883, pp. 188–190), and in accordance with said report the Commission issued the aforesaid order of June 22, 1911.

After the orders had been served upon the interested parties the carriers who are appellees herein, filed two suits in the Commerce Court against the United States and requested the court to set the orders aside. In their petitions in said suits they alleged that the rates maintained by them to the long-distance points on the Pacific coast were forced upon them by water and other competition; that, although said rates were more than sufficient to pay the out-of-pocket expenses incident to the handling of the traffic, they were less than the carriers might reasonably exact; and that the rates charged by the carriers to the shorter distance intermediate points were reasonable *per se*. And, based upon these premises, the carriers charged, first, that said section 4 as amended, as aforesaid, is unconstitutional; and, second, that, assuming that the section is constitutional, the orders of the Commission are invalid, because in making them the Commission exceeded the powers conferred upon it by said act. (Rec., No. 883, pp. 8–12, 35–42; No. 884, pp. 7–11, 23–30.)

After the suits were filed as aforesaid, the Interstate Commerce Commission intervened therein on behalf of the respondent and filed a motion to dismiss in Nos. 883 and 928 and an answer in Nos. 884 and 929. (Rec., No. 883, pp. 273–274; No. 884, pp. 39–42.) A motion to dismiss was filed on behalf of the United States in each of said suits. (Rec., No. 883, pp. 329–330; No. 884, pp. 53–54.) Thereafter several other parties were allowed to intervene, and in each of said suits an answer was filed on behalf of the Chicago Association of Commerce and on behalf of the city of Spokane and other parties located in said city. (Rec., No. 883, pp. 292, 333; No. 884, pp. 45–61.)

The cases were heard together upon motions for preliminary injunctions and supporting affidavits filed by the carriers and upon the pleadings above mentioned. Whereupon the Commerce Court rendered an opinion in the premises and granted an injunction enjoining, temporarily, enforcement of the orders. (Rec., No. 883, pp. 337–347; No. 884, p. 65.)

Thereafter the court, having been advised that in Nos. 883 and 928 the United States and the Interstate Commerce Commission had elected to stand upon their respective motions to dismiss (Rec., No. 928, p. 1), and that the United States had elected to stand upon its motion to dismiss in Nos. 884 and 929 (Rec., 929, p. 1), the cases were assigned for further hearing and, upon application, the Interstate Commerce Commission was allowed to

and did withdraw its answer in Nos. 884 and 929 and adopt the motion to dismiss which had previously been filed therein on behalf of the United States, and further changes in the pleadings were made as follows: The Chicago Association of Commerce withdrew its answers and filed in each of said suits a motion to dismiss, and other parties who had intervened as respondents adopted the motions to dismiss which had previously been filed on behalf of the United States. Thereupon the Commerce Court entered final decrees, making permanent the preliminary injunction which had previously been entered, as aforesaid, in each of said suits. (Rec., No. 928, pp. 4–6.)

From the interlocutory and final decrees so entered by the Commerce Court appeals were taken to this court as aforesaid. (Rec., No. 883, p. 355; No. 928, pp. 7–8; No. 884, pp. 65–71; No. 929, p. 6.)

The Commerce Court based its final decrees upon the reasons which were stated in the opinion rendered by it in connection with the preliminary injunctions. (Rec., No. 928, p. 5.)

The assignment of errors relied upon in Nos. 883 and 928 differs from that relied upon in Nos. 884 and 929 in that it is contended that the order involved in Nos. 883 and 928 is not an order within the meaning of section 1 of the Commerce Court act of June 18, 1910. (Rec., No. 883, pp. 351–354.)

POINTS.

THE ORDER OF JULY 31, 1911, INVOLVED IN NOS. 883 AND 928, IS NOT AN ORDER OF THE COMMISSION WITHIN THE MEANING OF SECTION 1 OF THE COMMERCE COURT ACT OF JUNE 18, 1910.

In Nos. 883 and 928 the Commerce Court acted under authority conferred upon it by the second jurisdictional clause contained in section 1 of the Commerce Court act of June 18, 1910, which provides that the court shall have jurisdiction in—

> Cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

But it will be observed that the so-called order was simply a decision rendered by the Commission in response to certain applications filed by the carriers wherein the Commission was requested to grant relief from the rule of the fourth section which prohibits a common carrier from exacting a greater charge for the shorter than for the longer haul, but provides:

> That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for

> the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: * * *.

In granting in part and refusing in part the relief asked for by the carriers, the Commission, in accordance with authority conferred upon it by section 4, as above shown, simply exercised its judgment and gave the carriers the relief from the rigid rule of that section to which it considered them entitled.

The extent of the relief, if any, to be granted, is a matter which, by the language of section 4, is left entirely to the judgment of the Commission, and after the Commission has acted in the premises its action can not, where, as in this case, there is no allegation of fraud or corruption, be made the basis of a suit in court; but even if this suit were grounded upon such an allegation the Commerce Court would not have jurisdiction over it, because such suit would not be based upon an order of the Commission.

The rule of the fourth section prohibiting the greater charge for the shorter haul is general; it is only in special cases where, upon application, the Commission is of opinion that relief from that rule should be granted that any relief at all can be obtained by a carrier, and it will be observed that the Commission may either grant or refuse to grant the relief in an *ex parte* proceeding and

without the formal hearing provided for in section 15 of the act. In other words, a proceeding before the Commission, upon an application made by a carrier under authority conferred by section 4, is not a controversy wherein the Commission may make such an order as is provided for in section 15 of the act. Properly speaking, such a proceeding is not a controversy at all, nor is the decision rendered by the Commission in response to such application an order in the sense that it requires the carrier to do something in addition to what is required by the law itself; it is simply the expression by the Commission of an opinion concerning the relief from the rule of the fourth section to which the carrier is entitled. So far as the order operates to change the duty which would otherwise be imposed by law upon the carrier, it operates not against but in favor of the carrier, and it is evident that such a result is not one concerning which the carrier can consistently complain. If, after the Commission has rendered its decision in the premises, the legal duty imposed upon the carrier violates one or more of the carrier's rights under the Constitution, it does so not by reason of the action of the Commission but because of the mandate of the law.

It is apparent that the Congress might have made absolute the rule of the fourth section prohibiting the greater charge for the shorter than for the longer haul, and had it done so no constitutional right of the carrier would have been thereby vio-

lated. Is it possible that by granting to the carrier a concession and giving it such relief as the Commission, upon application and after investigation, might consider it entitled to, the Congress furnished to the carrier also an opportunity to obtain relief in court to which it would not otherwise be entitled? We think not. After the Commission has acted upon such an application and granted relief to a carrier, the carrier may take advantage of the relief thus granted and make such disparities in rates as the Commission authorizes, but is not obliged to do so—that is to say, the Commission simply *authorizes* the carrier to do something, but does not *require* it to do anything. In such a case the Commission does not make an order within the meaning of section 1 of said Commerce Court act. In these cases it was not necessary for the carriers to apply to the Commission for relief, but, having elected to do so, they are bound by the action taken by the Commission. (*Louisville & Nashville R. R. Co.* v. *Kentucky,* 183 U. S., 503, 514–516.)

We therefore insist that, in assuming jurisdiction over the so-called order of July 31, 1911, the Commerce Court committed an error.

THE COMMERCE COURT ERRED IN NOT DISMISSING THE PETITIONS FOR WANT OF EQUITY.

In the final decrees of the Commerce Court it is stated that the decrees are based upon reasons given by the court in its opinion of November 14, 1911.

(Rec., No. 928, p. 5.) We therefore deem it proper to give a brief summary of the statements contained in the opinion, which is as follows:

1. Section 4 as amended by act of June 18, 1910, is constitutional. (Rec., No. 883, p. 342.)

2. If first proviso were literally construed legislative power would be delegated, and proviso would therefore be unconstitutional. (Rec., No. 883, p. 342.)

3. If this proviso were unconstitutional the whole section would be unconstitutional, because the section, without the proviso, would not have been enacted. (Rec., No. 883, p. 342.)

4. But this proviso is to be construed with other sections, and right and duty of Commission to grant relief provided for in section 4 is imposed, where the Commission finds that granting such relief will not result in violation of any other section. (Rec., No. 883, p. 342.)

5. If rates to long and short haul points proposed by carrier do not result in unreasonable rate *per se,* or undue prejudice, to short-haul point, or undue preference to long-haul point, Commission must grant the relief referred to. (Rec., No. 883, p. 342.)

6. As between long-haul points on the one hand and short-haul points on the other, Commission's orders fix relations of rates, in percentages, but not in dollars and cents; nor do the orders fix any absolute rates. (Rec., No. 883, p. 342.)

7. Commission found that the long-haul rates were forced; that is to say, forced by water competition from some of the points of origin, and by market competition from the other points of origin. (Rec., No. 883, p. 343.)

8. Under old fourth section carriers had, as an initial matter, authority to make such disparities between long and short haul points as they considered justified by differences in circumstances and conditions. (*E. T., V. & G. Ry. Co.* v. *I. C. C.*, 181, U. S., 1, and cases therein cited.) (Rec., No. 883, p. 343.)

9. Abuse of this authority by carriers was one of causes which led to enactment of new fourth section. (Rec., No. 883, p. 343.)

10. Practical change effected by new fourth section is to compel carriers to discontinue such disparities or apply to the Commission for the relief provided for in that section. (Rec., No. 883, p. 343.)

11. Old fourth section could not be violated unless third section were also violated. (Rec., No. 883, p. 343.)

12. In *E. T., V. & G. Ry. Co.* v. *I. C. C., supra,* the court held that the third section could not be violated by disparity in rates if the long-haul rate were forced upon the carrier by competition at the long-distance point and was not wholly unremunerative. (Rec., No. 883, p. 343.)

13. If, to meet competition from New York to Seattle, a carrier makes a lower rate from St. Paul to Seattle than from

St. Paul to Spokane, it is not thereby guilty of undue prejudice, because "if the lower rate to Seattle were forbidden Seattle would nevertheless, by reason of its location, be able to secure its supplies by water, and would therefore in the nature of things have this advantage over Spokane." (Rec., No. 883, p. 344.)

14. The amendment to section 4 of June 18, 1910, has not changed the construction of section 3, and it follows, therefore, that no unjust prejudice to Spokane and other interior points can now be predicated merely on the fact that the rate from any of the eastern territory is less to the Pacific coast terminals than to the intermediate points. (Rec., No. 883, p. 344.)

15. Commission found that the carriers, upon whom in this regard burden was imposed, did not prove that rates from Zone 1 to Pacific coast terminals were less than reasonable *per se,* and while this would enable the Commission to deny relief as to present rates it did not give the Commission a right to say that if, in future, to meet new water competition the carriers should reduce the Pacific coast rates to a point lower than what would be reasonable *per se,* although not lower than what would be remunerative, they might not charge at the short-distance points rates higher than those contemporaneously exacted at the Pacific coast terminals; and the same principle applies to other zones mentioned in the Commission's order, from which the Commission permitted the

carriers to make disparities which should not exceed certain percentages named by the Commission. (Rec., No. 883, pp. 344–346.)

16. If, to meet competition from New York to Seattle, the rate from St. Paul to Seattle is made lower than what would be reasonable *per se,* although not lower than what would be remunerative, Spokane might complain of undue prejudice if the St. Paul-Spokane rate were made higher than the New York-Spokane rate. (Rec., No. 883, p. 346.)

17. Spokane might also complain of undue prejudice if the disparity between the New York-Spokane rate and the New York-Seattle rate were greater than the rate from Seattle to Spokane. (Rec., No. 883, p. 346.)

18. In so far as the Commission fixed a relation between rates which may be established in the future, and which, therefore, are unknown at the present time, it exceeded its authority. (Rec., No. 883, p. 346.)

19. If the forced New York-Seattle rate is $1, the carriers can not, under the orders of the Commission, make a rate as low as $1 to Seattle from St. Paul, unless they also make rates as low as $1 to Seattle from points intermediate between St. Paul and New York; but, as long as the carriers charge no one else an unreasonable rate, and as long as they do not carry under cost, they are entitled to grant to St. Paul the competitive rate of $1. (Rec., No. 883, p. 346.)

20. The effect of the orders would be to put Spokane and other interior points on an

> equality with Seattle and other Pacific coast points, at least from Zone 1—a position to which they would not be entitled under all circumstances in view of their relative locations. (Rec., No. 883, p. 347.)

It will be observed that the holdings of the Commerce Court, contained in the first five paragraphs of the summary, agree with the conclusions reported by the Commission, except that the Commission was of the opinion that where a carrier applies for relief from the rule of the fourth section it must show that the unreasonableness, undue preference, and undue prejudice referred to will not result from the granting of such relief. (Rec., No. 883, p. 129.)

As we understand the remainder of the court's opinion, the court held that the Commission acted beyond its power because, after finding that the long-haul rates were forced by competition and without finding either that the rates to the short-haul points were unreasonable, or that the rates to the long-haul points were unremunerative, and without prescribing any absolute rates, it found that undue discrimination would result if disparities greater than those authorized by the Commission were made. Also, it seems that the court was of opinion that upon the facts reported by the Commission undue discrimination could not exist.

The Commission's understanding of the authority conferred upon it by the amended fourth section and the method of procedure which must be

followed by the Commission when operating under that section, and also the Commission's views concerning errors committed by the Commerce Court in setting aside the orders of the Commission, as shown by the opinion of the court above referred to, are so clearly, concisely, and fully stated in the Commission's twenty-fifth annual report to the Congress, dated December 20, 1911, that we think best to and do insert herein the following excerpt therefrom:

> These so-called orders of the Commission have been enjoined by the Commerce Court for reasons given in its opinion. Perhaps the best method of stating the situation is to give, from the standpoint of the Commission, exactly the interpretation and application of the amended fourth section which we had in mind, and to point out, in that connection, the apparent difference between the interpretation of the Commerce Court and that of this body.
>
> The fourth section prohibits, in general terms, the charging of more for the short than for the long haul, but provides that the Commission may, upon application to it, relieve carriers from the obligation of this section by permitting the higher rate at the intermediate point. If this language were to be taken at its face value, this body would be invested with the arbitrary power of granting such relief in one case and denying it in another, although the two cases were practically identical. We have held, however, that

it was not the intent of Congress to attempt to confer such arbitrary jurisdiction upon this Commission, but that we must act, in passing upon these fourth-section applications, in view of the other sections and provisions of the act to regulate commerce. It is our duty to inquire with respect to each application whether, if the carrier is allowed to make the higher charge at the intermediate point, it will result in rates which are unreasonable or unduly discriminatory.

The section also authorizes the Commission to prescribe the extent to which the carrier may be relieved from the rule of the section. We understand this to mean that if the Commission reaches the conclusion that some higher charge might properly be imposed at the intermediate point, but that the present discrimination is too great, then it may fix the extent to which the rate at the short-distance point may exceed that at the long-distance point.

The Commerce Court agrees that it is the duty of the Commission to examine each application, but only, apparently, for the purpose of ascertaining whether there are competitive conditions at the more distant point which do not exist at the intermediate point. If such conditions exist, then it is the duty of the Commission to permit the charging of the lower rate at the more distant point, without reference to the intermediate rate, except in so far as that rate may be found to be unreasonable in and of itself.

In the opinion of the Commerce Court, if we find competitive conditions at the more

distant point which do not obtain at the intermediate point we must grant the relief, and can only inquire whether the intermediate rate is reasonable. In the opinion of the Commission we must go further and must inquire, not only whether competitive conditions do exist at the more distant point, but also whether those conditions justify the discrimination against the intermediate point evidenced by the rates in force. If we find that those competitive conditions do exist, but do not justify a discrimination of the degree now in force, then it is our duty to prescribe the extent to which the discrimination may go, if at all.

The Commerce Court refers to certain decisions of the Supreme Court of the United States made under the act as it existed previous to the amendment of 1906, when the Commission had no authority to prescribe a reasonable rate for the future, nor to determine the undueness of a particular discrimination in support of its conclusion. It deduces from those decisions, apparently, the rule that where competition exists at the long-distance point the rate to that point can not be made the measure of a rate to the intermediate point.

Manifestly, a compelled rate, to the extent that it is not voluntary, can not with justice be made the measure of a reasonable rate.

The Commission desires to make plain at the outset that this principle has been fully recognized by it in passing upon applications under the amended section. Wherever

the rate to the long-distance point is fixed and beyond the control of the applicant, we do not require the applicant to observe any relation between the long-distance and the intermediate rate; we have simply inquired whether the intermediate rate is reasonable.

It sometimes happens, for example, that a State commission names a rate between two points within a State. A circuitous interstate line desires to meet this rate. Under these circumstances the Commission recognizes the State rate as fixed, and if it finds that the other route is circuitous and that its intermediate rates are reasonable it permits the long line to meet the State rate without reference to its intermediate rates. If the State commission were to advance or to reduce its rate the interstate line might vary its own tariff between those points without any change whatever at the intermediate point.

Passenger tariffs are generally constructed upon a mileage basis. We have uniformly recognized the short line as the rate-making factor and have permitted the circuitous line to meet the rate of the short line without any reference to its intermediate points so long as the fare to those points was properly constructed.

So, again, where a freight rate upon a particular commodity is made by a short interstate line we have permitted its circuitous competitor to meet the short-line rate without reference to its intermediate territory, provided it was clear that the short line

did make the rate, that the long line simply met that rate, and that its intermediate rates were apparently upon a proper basis. If the short line were in the future to reduce that rate, the long line is allowed by the terms of our orders to meet that reduction without a corresponding reduction at intermediate territory.

We refer to these illustrations for the purpose of making it perfectly plain that this Commission has recognized from the first the injustice of making a rate over which the carrier has no control whatever the measure of its other rates, whether they be intermediate rates or whether they be upon other parts of its system. We have established a relation between these Pacific coast terminal rates and corresponding rates to interior territory, because neither the terminal rate nor the interior rate is fixed by causes over which the carrier has no control, but both are, within certain limits, voluntary.

As illustrating what is meant, take that rate which supports most strongly the position of the carrier, namely, the rate from New York to San Francisco. We have found, and it can not be gainsaid, that merchandise of almost every kind can move by the water route between these points, and that therefore the rate made by water does limit and control the rail rate between the same points. But this does not amount to a fixing of that rate in the same way that a State commission fixes the State rate or that the number of miles fixes a passenger rate,

or that the short line makes the freight rate as against its circuitous competitor. There is still a comparatively wide range within which this transcontinental rail rate from New York to San Francisco may be varied.

The water rate is not a continuing and a permanent rate, but rather fluctuates from day to day and from season to season. The rail rate of the transcontinental line depends upon whether it is the purpose of that line to take much or little of the business. A rate of $1 per 100 pounds will carry but little of a commodity; 85 cents per 100 pounds will carry some of it; 70 cents per 100 pounds may drive the ships out of the business. Now, within those limits what rate shall the carrier make?

It is truly said by the railways that each locality is entitled to its natural advantages. If San Francisco is situated upon the ocean, and if it can obtain freight by water for that reason, this is a natural advantage which the railway has a right to recognize as compared with Reno.

But it can only recognize that natural advantage; it must not give to it an additional artificial advantage. San Francisco is entitled to that freight rate which the water would give it if there were no railroad. It is not entitled to a rail rate 25 per cent lower.

If there were no water competition at San Francisco, it would be a discrimination against Reno to make as low a rate to the more distant point as to it, and to just the

extent that the rail line gives to San Francisco a rate below that to which its natural advantage entitles it, to that extent it discriminates against the intermediate point.

Now, who is to say whether the rate made to San Francisco is or is not properly induced by water competition at that point? Who shall determine whether the transcontinental rail line is, upon the pretext of water competition, giving to the terminal point a rate below what its natural position would entitle it, and thereby discriminating against the intermediate city of Reno? The Commerce Court is of the opinion that no restraint can be put upon the limit to which this discrimination may go; the Commission is of the opinion that Congress has endeavored to invest this body with authority to inquire whether the action of the railway in meeting this water competition is justifiable.

In what way can the Commission give effect to its conclusion? It can not fix a rate from New York to San Francisco below which the rail line shall not go, for it has no authority to fix a minimum rate. There is, therefore, no way in which it can prevent this discrimination by the fixing of an absolute rate at San Francisco and another absolute rate at Reno. It can only accomplish this purpose by prescribing the difference which may properly exist owing to the effect of this competition and allowing the carrier to make whatever rate it sees fit to the more distant point so long as it observes this differential.

The Commission might determine a rate below which the traffic would be unremunerative to the carrier and might refuse relief in case the carrier fell below this rate, but such an order would not reach the difficulty, since the point of discrimination might be passed long before the unremunerative rate was reached.

What is above said applies only to the rate from New York to San Francisco, which is in no sense this case. The competition there involved is entirely that of carriage, the only question being whether this merchandise shall go by rail or by water. If transportation competition alone were to govern these rates, the moment New York is left the rate would increase and would continue to increase with the distance from the Atlantic seaboard. If the water competitive rate from New York to San Francisco were $1 and the rail rate from Omaha to New York were 50 cents, then the rate from Omaha to San Francisco by rail, made to meet water competition, must be $1.50.

The Commerce Court holds that San Francisco is entitled to the advantage of its location. What, then, is the advantage of San Francisco as compared with Reno when the traffic is taken up at Omaha? Clearly, transportation conditions do not justify the lower rate to the terminal point, nor do the carriers so claim. The New York rate has been extended to all this territory east of the Rocky Mountains under the influence of other competitive conditions. If we were to assume

that the rate from New York to San Francisco was absolutely fixed by water competition—which is not the fact—still every rate outside of New York is voluntarily made by the carrier.

The transcontinental lines urge that they desire to place Omaha in the San Francisco market as compared with New York. This is not because of any natural advantage which either Omaha or San Francisco possesses, but because it accords with the policy of the railway line leading from Omaha.

Assuming that the railway may properly place Omaha upon a level with New York, who is to determine what rate is necessary for that purpose? If the expense of owning a given commodity is exactly the same in New York as in Omaha, then the same rate of freight is required, but it is notorious that this expense is not the same. With the same rate of transportation New York will engross the market in case of some commodities and Omaha in case of others. How can it be said that competition requires the establishment of the same rate from both these markets? If this theory were to be correctly applied, then the carrier should inquire with respect to every single article what the relative cost of manufacture is at these different points and should make such a transcontinental rate as would equalize that cost, but this would be an absurdity. Both the courts and this Commission have repeatedly said that rates ought not to be established upon any such basis.

With respect to traffic originating at Omaha, and, indeed, with respect to all transcontinental traffic moving by rail, Reno has an advantage of location, in that the haul to that point is much less expensive than to San Francisco. Every argument which justifies the Southern Pacific lines in desiring to originate this traffic at Omaha rather than at New York applies to a delivery at Reno rather than at San Francisco.

Here is a carload of merchandise which is to be taken either to Reno or to San Francisco and distributed from one or the other of those points. The territory of distribution is identical. Now, it is a useless waste of transportation energy to haul that carload, as a carload, across the mountains and to haul the less-than-carload business back again instead of stopping the car in the first instance at Reno and making the distribution from that point, which is exactly what the present adjustment of rates compels.

In a less degree, the same consideration applies to traffic which is to be finally consumed at either Reno or San Francisco. The expense of building, of living, of transacting business at Reno as compared with San Francisco determines, to a considerable extent, the development of that community. It is a waste of transportation and therefore uneconomical and wrong to maintain a system of tariffs which are expressly intended to develop these coast cities and to arrest the development of the interior point. If traffic is to be moved by rail,

whether from New York or from the Missouri River, the interest of the carrier requires that it should stop at the intermediate point rather than go on to the more distant point. Even though it might temporarily be for the advantage of the carrier to haul this business across the mountains for the mere purpose of hauling it back again, such a course of procedure can not, in the long run, make for the general weal.

The idea dwelt upon by the Commerce Court, and apparently controlling in its decision, seems to be that so long as the rate at the intermediate point is reasonable, it is a matter of indifference to that locality what rate may be made to the more distant point. This utterly ignores the fact that the railroad is a public servant, owing a common duty to both the long distance and the intermediate point, and that no rate to the intermediate point can be reasonable so long as the carrier is maintaining at the more distant point a lower rate, except in so far as that lower rate is compelled by causes which the carrier does not control. If the carrier by its voluntary act maintains the lower charge to the more distant point, that in and of itself makes the higher charge at the intermediate point unreasonable.

Let us take this illustration. Some article, like soap, is manufactured both in the city of New York and in the city of Chicago, two localities which are connected by several lines of railway. The established rate for

the transportation of soap between these two communities is perhaps 35 cents per 100 pounds, with a correspondingly less rate at intermediate points.

A manufacturer of soap in the city of Chicago approaches a traffic official of the Pennsylvania lines with the suggestion that if a sufficiently attractive rate were named his factory might do considerable business in the city of New York and thereby afford to the railroad a certain amount of business. Upon consideration, the traffic man determines to establish between those communities a rate of 15 cents, which would pay something above the cost of movement.

The city of Pittsburgh complains that this rate violates the fourth section, in that the rate to New York is 15 cents per 100 pounds, while the rate to Pittsburgh, an intermediate point, is 25 cents per 100 pounds, and the traffic manager of the Pennsylvania Railroad replies:

"You are correct that we make a lower rate to New York than to Pittsburgh, but you have no cause for complaint. My road, by the establishment of this rate, obtains a certain amount of business which it could not otherwise obtain. The rate which we observe at Pittsburgh is a reasonable rate, and a reasonable rate is all you are entitled to. Therefore you are not injured and should hold your peace."

A soap factory is constructed at Pittsburgh, which now demands that it be put into New York and Chicago in competition with

those factories, and they also insist that their rates to Pittsburgh shall be so reduced that they may meet the competition of the new factory at that point. The Pennsylvania Railroad, upon the theory of the Commerce Court, may do exactly as it sees fit. It may reduce the rate to and from Pittsburgh without reference to its intermediate territory or it may maintain that rate as it is.

Probably no traffic official could be found who would justify any such system of rate making. It is impossible to dissociate the intermediate from the long-distance point. Whether the intermediate rate is reasonable depends upon what rate is made to other points on both sides of it, and to permit the railroads of this country to select points where they will and where they will not compete would be intolerable.

It will be found that this thing called market competition rests in all cases in the mind of the traffic manager. It is the expression of a desire to obtain business which otherwise would not be obtainable. Its only law is the will of the individual who names the rate.

To justify their rates from coast to coast the railroads advance water competition, and to justify the same rates from interior points to coast points they rely on market competition. In other words, the carriers very properly meet an actual or potential competition by sea by charging less to the coast points than to intermediate cities. This discrimination is not of their own cre-

ating; it is forced upon them and therefore lawful. Then they adopt a policy of their own, which they term "market competition," under which they give lower rates from all interior cities two-thirds of the way across the continent to these same coast cities than to intermountain points. This is the kind of discrimination the Commission has attempted to minimize.

We recognize fully the effect of water competition both from Atlantic seaboard cities and from interior points upon the rates to the Pacific coast seaboard. This we do although we have the frank admission of the railroad managers that they have subsidized or bought some of the steamship lines and terrorized others until they can make the boast that the effect of the sea has been "neutralized." But we think there should be a limit to the discrimination that the carriers can effect by reason of their own chosen policy of market competition. If Kansas City and Denver are to be given access to San Francisco or Seattle at a certain freight rate, then we have said that Reno and Spokane should be charged no higher rate. For these rates from Denver and Kansas City are not the result of compulsion; they are voluntary rates made by the railroads to give these cities access to the coast markets. This is railroad policy, and there must be a limit to it, else there is no kind of discrimination that is unlawful, and both the third and the fourth sections of the act become a nullity. A railroad policy of rate making must cer-

tainly be subject to the limitations of the law, or else there is no law. For all rates are matters of railroad policy. To say that there is a long and short haul section under which a carrier may not charge more for the shorter than for the longer haul, but that the railroads may to any extent they please carry out a policy of blanketing the country for the benefit of the farther points and not the nearer points, is to say that a railroad may, without restraint, effect a ruinous discrimination and give no justification save its own determination or whim. There can be no regulation of rates as to discrimination or preference under such an interpretation of the law.

The Supreme Court has held, apparently, that this form of competition may be recognized in the naming of rates, but certainly it must be open to the regulating tribunal to determine whether in a particular case market competition, even though it exists, justifies the discrimination. Unless that be so, there can be no regulation of rates in this country. This is the underlying issue which will be presented to the Supreme Court upon the appeal from the decision of the Commerce Court.

The Commerce Court intimates that the mistake of the Commission is in having attempted to fix a relation of rates instead of establishing reasonable rates; but, as we have already pointed out, there is no way in which the discrimination found to exist in these tariffs can be prevented except by

fixing a differential, since we have no power to establish an absolute rate or fix a minimum charge below which the carrier is not free to go.

It should also be noted that the method adopted by us gives carriers a much greater latitude in the naming of their rates than if we had fixed absolute rates. If, for example, the Commission had named a rate of $1 from New York to Seattle and $1.25 from New York to Spokane, the carrier must have observed exactly these rates, unless some deviation was permitted upon application to the Commission. We have said that the rate from New York to Spokane shall not exceed the rate from New York to Seattle by more than 25 per cent. Under this order the carrier may establish a rate of $1 to Seattle and $1.25 to Spokane, as it might under the plan suggested by the Commerce Court, but under our order it may also vary those rates up or down, at its pleasure.

What we carefully refrained from doing was to establish any absolute rate. We simply held that from certain defined territories rates to the intermediate point should not exceed those to the more distant points by more than a certain amount, because, looking to the whole situation, a greater difference would result in undue discrimination against the interior point.

By reference to the map it will be seen that the eastern boundary of Group I is not far east of the center of the continent.

Traffic from Omaha to San Francisco by water must be taken by rail to New York, there transferred to a ship, taken by ship to the Tehuantepec Railroad, there transferred to a railroad, carried 180 miles by rail, and again transferred to a ship for transportation to San Francisco.

We feel strongly that water competition, even when the widest reasonable latitude is given to the effect of market competition, can not by any possibility justify a higher rate from Omaha to Reno than from Omaha to San Francisco; from St. Paul to Spokane than from St. Paul to Seattle.

We were of the opinion that as the Atlantic Ocean was approached the effect of water competition became stronger and that there might be some excuse for slightly higher rates from Group II to intermediate points and that this difference might increase until the fourth group was reached. No consideration has yet been given to points in Group V.

It is proper to say that we entertained grave doubt whether any higher rate should, even now, be named from territory embraced in Group II, which includes Chicago, to intermediate points, and that we were largely influenced by the present adjustment. Many situations which are wrong must be gradually corrected.

Upon the other hand, it should be noted that the opening of the Panama Canal may so add to the intensity of this water compe-

tition as to call for some modification of the conclusions now reached.

There are three possible theories upon which this transcontinental situation can be disposed of:

1. Carriers may meet between New York and San Francisco the water rate. They may then apply from and to interior points whatever rate is thus named plus the local charge to or from the interior point.

This would meet the situation from a strictly transportation standpoint and, from that standpoint, would be unexceptionable.

If carriers had always applied or should now apply that system of rate making to the transcontinental situation, they might probably be safely left to name whatever rate they saw fit from New York to San Francisco as a water-competitive rate. The Commission would prevent discriminatory and unreasonable charges if it confined itself to the absolute rate at interior points.

2. If this is not done, then the carriers can be left free to give such effect as they see fit, be that much or little, to water competition and market competition, together with any other competitive conditions which they may fancy exist. That is the present system. That is the system which the Commerce Court holds must be perpetuated under the amended act; all of which means that the amended act is precisely to-day what the original act was before its amendment to every practical intent.

3. If the carriers see fit to adjust their tariffs as they have with reference to all competitive conditions, then some governmental tribunal may be given authority to say whether the rates established are just and reasonable. If not, then such an adjustment must be required as is, in the opinion of the governing authority, reasonable and just.

Congress might by direct enactment prescribe this relation, or it might apparently delegate that duty to some subordinate tribunal. It has been the understanding of this Commission that by the amendment of 1910 Congress endeavored to devolve upon us this duty. (Id. 31–41.)

In support of its rulings the Commerce Court apparently relied upon a decision of this court in the case of *E. T., V. & G. Ry. Co.* v. *Int. Com. Com.* (181 U. S., 1), popularly known as the Chattanooga case, but for the following reasons we think that decision is wholly inapplicable to the matters here involved:

In the Chattanooga case the complaint was that certain carriers were violating section 4 of the act, as that section existed previous to the amendment of June 18, 1910, by exacting greater charges for the transportation of freight traffic from eastern points of origin to Chattanooga than for similar transportation from said points of origin through Chattanooga to Nashville, a longer distance point.

In passing upon this contention of the complainant the Commission found:

> The Nashville rate is independent of the lines operating through Chattanooga, and those lines have no voice in determining its amount. That rate is made by the all-rail carriers via Cincinnati, and their action is uncontrolled by the defendant lines. * * * The acceptance of the rate so fixed by the rail lines via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic. (*E. T., V. & G. Ry. Co.* v. *Int. Com. Com., supra,* 6–7.)
>
> There is a conceded margin of profit in the rates now in force to Nashville and Memphis, with reference to the additional expense incurred in carrying eastern traffic to those destinations, but whether that margin affords reasonable compensation for the services thus rendered can not be determined from the evidence. (Id., 20.)

And the commission did not find that the rates to Chattanooga were unreasonable *per se.*

Upon the facts of record thus appearing this court said:

> In a supposed case when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter-distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative

> and has been forced upon the carriers by competition at the longer-distance point, it must result that a discrimination springing alone from a disparity in rates can not be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply. The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the results of conditions wholly beyond the control of such carriers. (Id., 18.)

In other words, this court held that the old fourth section could not be violated by a disparity in rates between the short-haul point on the one hand and the long-haul point on the other where the rate to the short-haul point was reasonable *per se* and the rate to the long-haul point was not unremunerative to the carrier and was fixed by circumstances over which the carrier making the disparity had no control.

In these cases the Commission did not find either that the rates to the short-distance points were unreasonable *per se*, or that the rates to the long-distance points were unremunerative to the carriers; but it did find, as above shown, that the disparities

in rates between the short-distance points on the one hand and the long-distance points on the other were unduly discriminatory. (Rec., No. 883, pp. 188–190.) And this finding necessarily included a finding that the rates to the long-distance points were not fixed by circumstances over which the carriers responsible for the disparities had no control.

But that is not all. The Commission pointed out that the competition relied upon by the carriers to justify the disparities where the traffic originated at points west of New York City was market competition which could not exist without the cooperation of the carriers responsible for the disparities, and that the competition relied upon by the carriers to justify the disparities where the traffic originated at New York City had from time to time been limited and controlled by such carriers. (Rec., No. 883, pp. 87–130, 171–188.) Also in Nos. 883 and 928 the Commission, as stated above, said:

> The carriers herein involved have not shown that undue discrimination was not effected by their rate adjustment between points in Nevada and points in California, nor have they established that the rates to the coast cities, if extended by them from eastern points outside the zone of water influence, are not fully compensatory. (Rec., No. 883, p. 129.)

It will thus be seen that, while the ruling of this court in the Chattanooga case was applicable to the facts reported by the Commission in that case, it is wholly inapplicable to the facts reported by

the Commission in these cases, and this is true even though no allowance be made for the difference in phraseology between the old fourth section and the new fourth section. This difference, however, we believe to be a matter of importance.

At the time the Chattanooga case was decided, the language of section 4 of the act was:

> SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, *under substantially similar circumstances and conditions,* for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance:
>
> *Provided, however,* That upon application to the Commission *appointed under the provisions of this act* such common carrier may, in special cases, after investigation *by the Commission,* be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section *of this act.* (Rec., No. 883, p. 73.)

The italics used above indicate the words included in the old fourth section which were omitted when that section was amended as aforesaid.

By comparing the language of the old fourth section with that of the new fourth section we observe that while formerly the greater charge for the shorter haul was made unlawful only where the circumstances and conditions pertaining to the transportation to the short-haul point were substantially similar to those under which the traffic was transported to the long-haul point, no such limitation applies now. Under the new fourth section the greater charge for the shorter haul is, as a general proposition, unlawful, and it is only where, in special cases, after the carrier has applied to the Commission for relief from the rigid rule of that section and the Commission, after investigation, has found the carrier entitled to relief, that any greater charge for the shorter haul is permitted. In other words, the old fourth section could not be violated by a disparity in rates if the circumstances and conditions at the short-haul point as compared with those at the long-haul point were substantially dissimilar, even though the disparity were found to be a violation of section 3; but under the new fourth section the greater charge at the short-haul point can not be made by the carrier or be permitted by the Commission if a violation of section 3 will result therefrom. We therefore think the difference in phraseology above mentioned is a matter of considerable importance.

It is also true that at the time its decision was rendered in the Chattanooga case the Commission had no authority to prescribe rates or practices for the future. Such authority, however, was conferred upon the Commission by the Hepburn law of June 29, 1906, and the Commission is now able to protect carriers and others against injuries they might otherwise suffer unfairly because of changes in circumstances and conditions.

We think the records in these cases show clearly that all the Commission did was to survey the entire field of operation, weigh carefully all the pertinent circumstances and conditions, and express its opinion concerning the extent to which the disparities made by the carriers could be permitted without bringing about the undue discrimination prohibited by section 3 of the act to regulate commerce. Had it done less it would have failed to do its duty, and the fact that it did nothing more proves conclusively that it did not exceed the power conferred upon it by the law under which it operates.

As above shown, the Commerce Court said that the effect of the Commission's orders would be to put Spokane and other interior points on an equality with Seattle and other Pacific coast points, at least from Zone 1, and also said that this was a position to which, in view of their locations, Spokane and other interior points were not entitled; and we think this indicates that the Commerce Court was of opinion that it had a right to substitute its own judgment for the judgment of the Commission

concerning the character of the discrimination involved. But under the ruling of this court in a recent case, as we understand that ruling, such substitution of judgment is not permissible. (*Int. Com. Com.* v. *D., L. & W. R. R. Co. et al.*, 220 U. S., 235, 251–252, 255–256.)

We therefore insist that in failing to dismiss the petitions for want of equity the Commerce Court committed an error.

CONCLUSION.

We think the principal errors of the Commerce Court may be summarized as follows:

1. The court erred in holding that the only effect of the amendment of June 18, 1910, was to take from the carriers their right, as an initial matter, to determine whether, as between the short-haul points on the one hand and the long-haul points on the other, the circumstances and conditions pertaining to the transportation were substantially dissimilar. We have seen that under the old fourth section, in the absence of complaint, the carriers might make such disparities as they considered justified by differences in circumstances and conditions, and where such disparities were so made the carriers could not be required to discontinue them because in violation of that section until it had been established as a fact that the dissimilarity above mentioned did not exist. Under the new fourth section, however, no such disparity can be made in any case until the commission has author-

ized it, and the commission can not authorize such a disparity except upon application of the carrier and where, after investigation, the commission concludes that the disparity will not result in either unreasonableness *per se* or undue discrimination.

We thus see that under the old fourth section a carrier could establish a greater rate to the short-distance point and continue to exact such greater rate until, in a controversy where its right to do so was challenged, the Commission decided that such right did not exist; while under the new fourth section such right, as a general proposition, does not exist at all, and can only be created by a conclusion made by the Commission in a proceeding instituted by a carrier under the proviso for relief above referred to.

We therefore think it apparent that the difference in effect as between the old fourth section on the one hand and the new fourth section on the other is much greater than that pointed out by the Commerce Court.

2. The court erred in holding that the Commission exceeded its authority in fixing relations of rates in percentages without naming any absolute rates or relations of rates in dollars and cents.

As above shown, the Commission has no authority to fix absolute rates, and in the absence of such authority it could not, of course, fix relations of rates in dollars and cents. Also, if it could not fix the relations in percentages, it could not in all

cases prevent the undue preference and undue prejudice which are prohibited by section 3 of the act.

3. The court misinterpreted the report of the Commission because it assumed that the Commission was of the opinion that the long-distance rates were forced upon the carriers by competition over which the carriers had no control, while the opposite of this proposition is correct.

The Commission, as hereinabove shown, found that undue discrimination would result if disparities between the long and short haul points greater than those authorized by the Commission were made, and, in view of the facts that the Commission did not find either that the rates to the short-distance points were unreasonable *per se* or that the rates to the long-distance points were unremunerative to the carriers, the Commission's finding of undue discrimination necessarily included a finding that the long-distance rates were not forced upon the carriers by competition over which they had no control.

But that is not all. From first to last the reports of the Commission show clearly that, in the opinion of the Commission, the competition referred to is controlled either partially or wholly by the carriers who are responsible for the disparities condemned by the Commission.

4. For the reasons given above it necessarily follows that the court erred in assuming that the rule prescribed by this court in the case of *E. T., V. &*

G. Ry. Co. v. *Int. Com. Com., supra,* and hereinbefore referred to, is applicable to these cases.

5. The court erred in substituting its own judgment for the judgment of the Commission concerning the character of the discrimination involved.

This court will construe section 4 of the act, if possible, in such a manner as to accomplish the purpose the Congress had in view when it amended that section, and concerning that purpose there is not now and never has been any dispute. The Congress regarded as an evil which should be eradicated the practice of the carriers whereby they exacted charges for the transportation of traffic from certain points of origin over their lines of railway to intermediate points which were greater in a very large number of instances than the charges they contemporaneously exacted for the transportation of like traffic over the same lines in the same direction and through the intermediate points to longer-distance points, and by the amendment referred to undertook to prevent the continuance of that practice in all cases except where, upon application of a carrier and after investigation into the pertinent facts and circumstances, the Commission might be of opinion that the greater charge would not produce the unreasonableness, undue preference, or undue prejudice above referred to. In other words, the only exceptions to the rigid rule of the new fourth section which the Congress intended to permit were those which, in the opinion of the Commission, could be allowed without subjecting the

short-haul points to unreasonable rates and unjust discrimination. After fully qualifying itself to do so by performing every ministerial duty imposed upon it by law in the premises, the Commission simply expressed its opinion concerning the extent to which the greater charge might be made without producing such unreasonableness or unjust discrimination; and if that opinion is now declared to be unlawful merely because it does not agree with the opinion of the court it is apparent that the purpose the Congress had in view when it amended the fourth section of the act can not be accomplished.

The history of the legislation here involved shows clearly that the only reasons why the Congress did not make an absolute long-and-short-haul rule was because it wished to give the carriers in special cases the benefit of the Commission's judgment; that is to say, the benefit of such relief as the Commission might consider the carriers entitled to, after investigating the pertinent facts and circumstances and applying thereto the rules prescribed by the Congress for the guidance of the Commission and contained in sections 1 and 3 of the act, and because the Congress in regulating interstate commerce wished to avail itself of the knowledge and experience of a tribunal which was created expressly for the purpose of informing itself in connection with and arranging the details of such regulation.

6. The Commerce Court erred in assuming that the courts may review the conclusions of the Com-

mission as to rates and regulations to be established and maintained for the future, in the same manner and to the same effect as they might have reviewed orders made by the Commission prior to the passage of the Hepburn Act; that is to say, prior to the time when the Commission was authorized to prescribe rates and regulations for the future.

In the case of *Int. Com. Com.* v. *Ill. Cent. R. R. Co.* (215 U S., 452), decided January 10, 1910, which has been followed in several Interstate Commerce Commission cases passed upon since that date, this court pointed out that the power of review exercised by the courts over such orders as the Commission was authorized to make prior to the passage of the Hepburn Act would not now be proper in connection with such orders relating to the future as the Commission was by that act authorized to make. (*Int. Com. Com.* v. *D., L. & W. R. R. Co.*, 220 U. S., 235, and cases therein cited.)

7. The court erred in holding that the so-called order in Nos. 883 and 928, dated July 31, 1911, is an order within the meaning of section 1 of the Commerce Court act of June 18, 1910.

It is apparent that, under the authority conferred upon it by section 4 of the act, the Commission can not make an affirmative order, and we believe it to be equally clear that affirmative orders are the only orders of the Commission which by section 1 of the Commerce Court act above mentioned that court has jurisdiction to review.

On account of the reasons above set forth and for other reasons which will readily occur to the court we insist that the decrees of the Commerce Court annulling and setting aside the aforesaid orders of the Commission are erroneous and should be reversed.

Respectfully submitted.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission, Appellant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

UNITED STATES OF AMERICA *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY Company and sixteen other railroad companies.	No. 883. No. 928.
UNITED STATES OF AMERICA *v.* UNION PACIFIC RAILROAD COMPANY AND ten other railroad companies.	No. 884. No. 929.

INTERMOUNTAIN RATE CASES.

APPEALS FROM THE COMMERCE COURT.

BRIEF AND ARGUMENT ON BEHALF OF THE UNITED STATES.

STATUTES.

These cases involve the validity and construction of section 4 of the act to regulate interstate commerce of February 4, 1887, as amended by the act of June 18, 1910. (Ch. 309, Stat., 547.)

The section as originally enacted and as amended, with the omissions in the original section and addi-

tions in the section as amended italicized, is as follows:

SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge *and* receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission *appointed under the provisions of this act*, such common carrier may, in special cases, after investigation *by the Commission*, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section *of this act*.

SEC. 4. (*As amended June 18, 1910.*) That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or *route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act;* but this shall not be construed as authorizing any common carrier within the terms of this act to charge *or* receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the *Interstate Commerce* Commission such common carrier may in special cases, after investigation, be authorized *by the Commission* to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which

such designated common carrier may be relieved from the operation of this section: *Provided further, That no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.*

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

GENERAL STATEMENT.

The questions involved in the two cases are practically identical. Certain complaints on behalf of Reno, Nevada, and vicinity, and Phoenix, Arizona, in the southern part, and of Spokane, Washington,

in the northern part of the intermountain region were pending before the commission when the 4th section of the interstate commerce law was amended by the act of June 18, 1910. Within six months thereafter, as provided for in the second proviso of the section, the carriers made application to the commission to be relieved from the operation of the section. The Reno and Phoenix complaints had been treated as one case, and the Spokane complaint as another; and they were still so treated, but the order in each case was entered under said section 4, and both were based on the same considerations. The order in the Reno-Phoenix case was directed against seventeen railroad companies—all across-the-mountains carriers and those connected immediately therewith—and is in the following form (No. 883, R. 33, 34, 35):

FOURTH SECTION ORDER NO. 124.

> In the matter of the applications, Nos. 205, 342, 343, 344, 349, 350, and 352, on behalf of the Transcontinental Freight Bureau, by R. H. Countiss, agent, for relief from the provisions of the fourth section of the act to regulate commerce as amended June 18, 1910, with respect to rates made from eastern points of shipment which are higher to intermediate points than to Pacific coast terminals.

COMMODITY RATES.

These applications, as above numbered, on behalf of the Transcontinental Freight Bureau, ask for authority to continue rates from eastern points of shipment which are higher to intermediate

points in Canada and in the States of Arizona, New Mexico, Idaho, California, Montana, Nevada, Oregon, Utah, and Washington, and other States east thereof, than to Pacific coast terminals.

Full investigation of the matters and things involved in these petitions, in so far as they concern westbound commodity rates, having been had,

It is ordered, That for the purposes of the disposition of these applications, the United States shall be divided into five zones, as described in the following manner:

(The transcontinental groups hereinafter described are as specified in R. H. Countiss, agent's, transcontinental Tariff I. C. C. No. 929.)

Zone No. 1 comprises all that portion of the United States lying west of a line called Line No. 1, which extends in a general southerly direction from a point immediately east of Grand Portage, Minn.; thence southwesterly, along the northwestern shore of Lake Superior, to a point immediately east of Superior, Wis.; thence southerly, along the eastern boundary of Transcontinental Group F, to the intersection of the Arkansas and Oklahoma State line; thence along the west side of the Kansas City Southern Railway to the Gulf of Mexico.

Zone No. 2 embraces all territory in the United States lying east of Line No. 1 and West of a line called Line No. 2, which begins at the international boundary between the United States and Canada, immediately west of Cockburn Island, in Lake Hu-

ron; passes westerly through the Straits of Mackinaw; southerly, through Lake Michigan to its southern boundary; follows the west boundary of Transcontinental Group C to Paducah, Ky.; thence follows the east side of the Illinois Central Railroad to the southern boundary of Transcontinental Group C; thence follows the east boundary of Group C to the Gulf of Mexico.

Zone No. 3 embraces all territory in the United States lying east of Line No. 2 and north of the south boundary of Transcontinental Group C, and on and west of Line No. 3, which is the Buffalo-Pittsburgh line from Buffalo, N. Y., to Wheeling, W. Va., marking the western boundary of Trunk Line Freight Association territory; thence follows the Ohio River to Huntington, W. Va.

Zone No. 4 embraces all territory in the United States east of Line No. 3 and north of the south boundary of Transcontinental Group C.

Zone No. 5 embraces all territory south and east of Transcontinental Group C.

It is further ordered, (1) That those portions of the above-numbered applications that request authority to maintain higher commodity rates from points in Zone No. 1 to intermediate points than to Pacific coast terminals be, and the same are hereby, denied, effective November 15, 1911; (2) that petitioners herein be, and they are hereby, authorized to establish and maintain, effective November 15, 1911, commodity rates from all points in zones numbered 2, 3, and 4, as above defined, to points

intermediate to Pacific coast terminals that are higher to intermediate points than to Pacific coast terminals; provided, that the rates to intermediate points from points in zones numbered 2, 3, and 4 shall not exceed the rates on the same commodities from the same points of origin to the Pacific coast terminals by more than 7 per cent from points in Zone No. 2, 15 per cent from points in Zone No. 3, and 25 per cent from points in Zone No. 4.

The commission does not hereby approve any rates that may be established under this authority, all such rates being subject to complaint, investigation, and correction if they conflict with any other provisions of the act.

By the commission:

[SEAL.] JUDSON C. CLEMENTS,
Chairman.

The order in the Spokane case is directed against eleven of the same carriers, relates only to Spokane and other intermediate points on their lines, and expressly provides that the carrier shall comply therewith for a period of not less than two years. In other respects it is the same in substance as the order entered in the Reno-Phoenix case. (No. 884, R. 12, 13, 14, 15.)

By case No. 883 in this court, *United States* v. *Atchison, Topeka & Santa Fe Railway Company et al.*, it is sought to set aside the Reno-Phoenix order; while in case No. 884, *United States* v. *Union Pacific Railroad Company et al.*, the Spokane order is attacked.

HISTORY OF COMPLAINTS ON BEHALF OF INTERIOR POINTS.

A brief review of the complaints before the Interstate Commerce Commission will show the character of the problems that body had to solve and the thoroughness with which they had investigated every phase of the subject.

RENO-PHOENIX COMPLAINTS.

In August, 1908, the Railroad Commission of Nevada began before the Interstate Commerce Commission a proceeding against the Southern Pacific Company and others complaining of rates over the lines of those roads from eastern defined territory to Reno, Nevada, and vicinity. A large volume of testimony was taken, and on June 6, 1910, a report was handed down through Commissioner Lane (19 I. C. C., 238); and how well grounded those complaints were will appear from the opening paragraph of this report, to wit:

> The highest main-line rates to be found in the United States are those from eastern points to stations in Nevada. For carrying a carload of first-class traffic containing 20,000 pounds from Omaha to Reno the Union Pacific-Southern Pacific line charges $858. If a like carload is carried 154 miles further, to Sacramento, the charge is but $600. The first-class rate to the more distant point, Sacramento, is $3 per 100 pounds, and to the nearer point, Reno, $4.29 per 100 pounds. If a like carload of freight originates at Denver, 500 miles west of Omaha,

> **the same rates to Reno and Sacramento apply; and if the freight originates at Boston, 1,700 miles east of Omaha, the rates are the same. This interesting rate condition arises** out of two simple facts: (1) The whole of the United States from Colorado common points to the Atlantic seaboard, barring a few of the southeastern States, is one wide group or zone from which practically uniform rates to Pacific coast water points are made, and (2) the rates to Reno are based upon these blanket rates to coast cities, and amount to the sum of the rates to the coast plus the local rates back to point of destination. (19 I. C. C., 238, 239.)

The commission granted much of the relief sought, fixing a scale of maximum *class* rates (No. 883, R. 152, 153), but feeling that it did not have sufficient information to justify an order with reference to *commodity* rates, it directed that the carriers keep a record of all shipments into Nevada during a certain three months, and furnish the commission with a statement showing all pertinent facts; and the complainants therein were directed on or before October 1, 1910, to furnish to the commission and to the defendant company a list of commodities upon which commodity rates were desired, together with an outline of the various territories or groups from which commodity rates should apply. (19 I. C. C., 256.)

In October, 1908, the Maricopa County Commercial Club filed a complaint against the Santa Fe,

Prescott & Phoenix Railway Company and others, complaining of the rates from eastern defined territory to Phoenix, Arizona, and vicinity. This complaint was considered by the commission along with the complaint of the Railroad Commission of Nevada, and was disposed of in like manner as that complaint, under a separate report handed down on the same day. (19 I. C. C., 257.)

While the complaints were still pending under these orders, section 4 was amended, and the carriers filed their applications to be relieved from the requirements thereof, and the order complained of in the present case was entered by the commission thereunder.

SPOKANE COMPLAINTS.

The citizens of Spokane, through various bodies, have been persistent, from soon after the passage of the interstate commerce act in 1887, in pressing complaints with reference to rates from eastern points.

The first complaint was filed April 2, 1889, wherein it was insisted:

1. That the rates to Spokane Falls were unreasonable.

2. That they were discriminatory against Spokane Falls in favor of Portland and other points.

3. That a lesser rate was charged for a longer haul to Portland and other terminal points than to Spokane.

An extended hearing was given, and the commission found that the rates in force from St. Paul and

eastern points to Spokane were in themselves unreasonable, and considerably reduced the same. (5 I. C. C., 478, 505, 510.)

Subsequently the Great Northern Railroad was constructed, and thereafter an understanding was reached between the jobbers of the Pacific coast, who were complaining of the rates fixed to Spokane, and the transcontinental lines by which the original discrimination against Spokane was restored.

It appears a right of way through Spokane was donated by the citizens to the Great Northern Company under a supposed understanding that it would grant to the city the same rates that were given to the terminal points; but this alleged agreement not being carried out, a boycott was organized against that company, which resulted in the railroads granting such rates to Spokane that the jobbers of that city were enabled within a certain territory around the city to successfully compete with the coast jobbers. (15 I. C. C., 390, 391.)

In September, 1906, the city of Spokane and certain commercial bodies thereof filed another complaint with the Interstate Commerce Commission which presented three questions:

1. Whether there was undue discrimination between Spokane and the coast cities, which involved the question whether or not the 4th section was violated.

2. Whether certain privileges were allowed coast traffic which were denied Spokane.

3. Whether the rates to Spokane were inherently unjust and unreasonable.

A large volume of evidence was taken upon this complaint, and on February 9, 1909, Commissioner Prouty handed down the report of the commission, wherein it was held:

1. That the circumstances and conditions at the terminal points were substantially different from those at Spokane, and hence section 4, as then interpreted by the Supreme Court, could not be applied.

2. That sufficient evidence was not presented with reference to the second question to justify consideration of the same.

3. That both the class and commodity rates to Spokane were unreasonably high, and a maximum scale of class rates was prescribed, as was also of commodity rates in so far as they had been attacked in the complaint.

This report embraces over fifty pages of the reports of the Interstate Commerce Commission (15 I. C. C., 376–426), and shows that the most laborious inquiry and research had been made into every material question of fact.

The class rates then prescribed by the commission were made effective, except the Union Pacific and the Chicago and Northwestern lines were, upon petitions, relieved temporarily from the effect of the order. As to the commodity rates, the remaining defendants asked for additional time for working out, according to a suggestion of the commis-

sion, a more comprehensive scheme which could be applied not only to Spokane, but to additional territory.

On June 9, 1909, the city of Spokane filed a supplemental complaint putting in issue, among other matters, the remainder of the commodity schedules from the eastern destinations to Spokane, and asking that joint rates be named from destinations east of Chicago to Spokane upon both class and commodity rates. After the introduction of a large amount of additional testimony, the matter was again taken under advisement by the commission on December 28, 1909, and on June 7, 1910, the commission, through Commissioner Prouty, handed down another report wherein it was held that the rates then charged upon the commodities specified in the supplemental complaint from the territories mentioned therein to Spokane were unreasonable, and a schedule of reasonable maximum rates was filed as an exhibit to the report.

In view of a suggestion of counsel in the present case that the commission in said report found certain rates to be reasonable, which are higher than the rates which would result from an enforcement of the order attacked in this case, special attention is called to the following language of the commission used therein:

> In fixing these rates we have proceeded upon the view that, under the present decisions of the Supreme Court of the United States, we could not use the rate to Seattle

> as a standard by which to measure that to Spokane. If this were otherwise, if we were free to take into account all the competitive conditions existing both east and west and to determine what, in the light of all these conditions, would be a just and reasonable relation between the rates of Seattle and Spokane, a somewhat different question would be presented. (19 I. C. C., 174.)

It appears, therefore, that the relationship of Seattle and other terminal points to Spokane, and the competitive conditions existing at Seattle, were there given no consideration whatever by the commission, because the construction this court had given sections 3 and 4, when read together, had in the mind of the commission prohibited them from considering those matters.

However, the commission, not being wholly satisfied with the absolute accuracy of the result reached, did not order the rates prescribed into immediate effect, but said:

> We desire, however, to proceed in this matter with great caution and have therefore determined before making a final order to learn the result of an actual test. Carriers will be required, for the months of July, August, and September, 1910, or for such other representative months as may be determined upon by the commission after conference with the carriers, to furnish an accurate and detailed account showing the revenue which accrued upon business actually handled under present rates and the

> revenue which would have accrued upon the same business had the rates here prescribed been in effect. (19 I. C. C., 178.)

While this complaint remained thus suspended, section 4 of the interstate commerce act was amended by Congress.

APPLICATIONS OF CARRIERS FOR RELIEF FROM PROVISIONS OF THE 4TH SECTION.

While the various complaints above mentioned were thus pending, and within six months after the amendment of section 4 by Congress, the carriers, through their proper agents, filed a number of applications asking to be relieved from the hard and fast rule of the 4th section. These various applications were similar in form, and the first may be taken as an example of them all. This, after setting forth the several tariffs then in force, proceeded:

> In the name and on behalf of each of the carriers parties to the above-named tariffs, the undersigned, acting as agents and attorneys or under authority of concurrences on file with the commission from each of the said carriers, respectfully petition the Interstate Commerce Commission for authority to continue all rates shown in the above-named tariffs from eastern shipping points designated to the Pacific coast terminal points and other points designated, lower than rates concurrently in effect from intermediate points, and to intermediate points

> in Canada and in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Washington, and points east thereof.
>
> This application is based upon the desire of the interested carriers to continue the present method of making rates lower at the more distant points than at the intermediate points; such lower rates being necessary by reason of: (No. 833, R. 50.)

and there follows a recital of the several grounds which, it was claimed, justified the relief sought.

Thereupon the entire matter was again taken under consideration by the commission, and a large mass of additional testimony was taken, and arguments extending over many days were heard; and after another most painstaking research into every phase of the question the commission, through Commissioner Lane, on June 22, 1911, handed down its report in the Reno and Phoenix cases, and on the same day, through Commissioner Prouty, handed down its report in the Spokane case; and on these reports the orders now attacked were entered.

The most acute phase of discrimination between the terminals and interior points is thus set forth by Commissioner Lane (No. 883, R. 105, 106):

> We have noticed how through the years this blanket of class and commodity rates has been drawn westward from the sea-competitive point until it extends two-thirds of the distance across the continent. How have the carriers justified this blanket to

the coast but not to intermediate points? Long before the blanket had been stretched to its present western extent the communities intermediate between its eastern border and the Pacific made protest against the injustice that was being done. For nearly a quarter of a century this complaint has been heard and has ceased at times only to be revived with greater earnestness. A line of railroad policy which leads to such result may be presumed to have in it something artificial and unnatural. That which appeals to us as unnatural in this situation is that rates which are said to be less than reasonable because compelled by ocean competition are made from points where we can find no such competition. It does Reno no injustice for the transcontinental lines to give San Francisco a rate from New York that will enable them to carry traffic as against the ocean carriers out of New York. By such policy Reno secures the advantage of her proximity to San Francisco, an ocean terminus. If the ships out of New York find it profitable to pay the railroad rate from Pittsburg to New York in order to take the freight from the transcontinental lines, a rail rate which will meet this competition at Pittsburg is permissible. It is fairly established that the influence of water competition does not cease at the Pittsburg-Buffalo line, but extends westward as to certain particular commodities, and doubtless for some distance west of Pittsburg the carriers may

properly make rates which will prevent the movement eastward to the seaboard instead of westward over their lines; but we look in vain throughout the records of this commission for 20 years to find any but the most fragmentary evidence that sea competition extends to Chicago. On the contrary, it is the admission of the carriers themselves that the rates which they make from Chicago to the Pacific coast terminals are established in order that the manufacturers and the jobbers of the West may compete on a level with the jobbers and manufacturers who have the advantage of a location at the Atlantic seaboard.

PETITION OF ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL. (CASE NO. 833 IN THIS COURT.)

On the 4th day of October, 1911, the Atchison, Topeka & Santa Fe Railway Company and others filed in the United States Commerce Court their petition wherein is attacked the validity of the order entered in the matter of the Reno and Phoenix complaints. In this petition the carriers insist that the commission should have relieved them from the provisions of the 4th section on account of the existence of the following conditions at the terminals which did not exist at the interior points:

1. Water competition from the Atlantic coast around Cape Horn and through the Strait of Magellan and across the Isthmuses of Tehuantepec and Panama. (No. 883, R. 8.)

2. Competition by water from the Orient. (No. 883, R. 9.)

3. Competition between the various competing lines of railroads. (No. 833, R. 9.)

4. So-called *market* competition; that is, competition between manufacturers on the Atlantic coast who can ship their products by water and across the isthmuses to the Pacific coast, and manufacturers of the Middle West who can ship to the Pacific coast terminals only by rail or by paying cost of railroad transportation from point of origin to the Atlantic coast and thence by water to the Pacific terminals. (No. 883, R. 10.)

It was insisted that the commission's order was void because—

1. The 4th section of the interstate commerce act is unconstitutional in that it vests legislative power in the Interstate Commerce Commission, and prescribes no rule for the guidance of the commission in determining whether or not a carrier may be relieved from its provisions, and if so to what extent, but leaves the matter to the arbitrary will of the commission. (No. 883, R. 35, 36.)

2. That the order if enforced will in effect confiscate the petitioners' property. (No. 883, R. 36, 37, 38.)

(The Government, however, insists that the allegations of the petition are wholly insufficient to present this question.)

3. That the commission is not empowered to fix the differentials which shall be maintained between

the rates compelled by competition at the terminals and the just and reasonable rates which the petitioners are entitled to charge at interior points. (No. 883, R. 39, 40.)

4. That rates to the territory in question have heretofore been constructed on the principle of establishing just and reasonable standard class rates and making only such exceptions thereto as specified commodity rates as competition has required, which principle is overthrown by the order of the commission, and terminal rates are wrongfully made the measure of what shippers may lawfully receive at interior points. No. 833, R. 40, 41.)

5. That there are numerous rates to interior points reasonable within themselves, and the carriers are entitled to have these several rates considered and their reasonableness determined separately; and the commission acted arbitrarily and without authority of law in fixing zones and percentages applicable to all traffic regardless of whether such percentages will permit the moving of traffic to terminal points, and at the same time will allow reasonable rates to intermediate points. (No. 883, R. 41.)

The United States filed a motion that the petition be dismissed upon the following grounds: (No. 883, R. 329.)

1. Because section 4 of the interstate commerce act as amended by the act of June 18, 1910, is constitutional.

2. Because the petition shows that the Interstate Commerce Commission had jurisdiction over the subject matter involved, and that the order was entered in a proceeding properly instituted and conducted, and was within the scope of the commission's authority.

3. Because the petition fails to show that petitioners, or either of them, were deprived of their property within the meaning of the Constitution of the United States.

4. Because, even if the order be void because not within the commission's statutory authority, then the prohibition of the statute against charging a greater sum for the shorter than for the longer haul is absolute, and its operation can not be enjoined by the courts.

5. Because the petition contains no equities upon its face. (No. 883, R. 330.)

PETITION OF UNION PACIFIC RAILROAD COMPANY ET AL.
(CASE NO. 884 IN THIS COURT.)

On the 4th day of October, 1911, the Union Pacific Railroad Company and others filed their petition attacking the order entered by the commission in the Spokane case.

The grounds of attack are the same as those relied upon by the carriers in the other case, and the United States relied upon the same grounds in a motion filed to dismiss the petition in this case. (No. 884, R. 53.)

The cases were heard upon the motions of the United States to dismiss, and also upon the motions of petitioners for temporary injunctions. The motions of the United States were overruled by the court solely upon the ground that the Interstate Commerce Commission had no power to determine the relation of the long and short haul rates irrespective of absolute rates. (No. 883, 345–6.) The court considered only this question and the one as to the constitutionality of the act, and held that the act was constitutional. (No. 883, R. 342.) Judge Archbald concurred in the result, but was also of the opinion that section 4 of the act as amended is unconstitutional, and further that the orders of the commission are void because they do not relate to special cases within the meaning of the provisos of section 4. (No. 883, R. 347.) Temporary injunctions were granted by the court, errors were assigned, and from these interlocutory decrees appeals were prosecuted by the United States and the Interstate Commerce Commission and other intervenors to this court. (No. 883, R. 351, 355, 356.) Thereafter the United States and other parties defendant elected to stand upon the motions to dismiss, and the court thereupon entered final decrees in accordance with its former opinion. (No. 928, R. 1, 4; No. 929, R. 1, 3.) From these decrees appeals were likewise prosecuted to this court, and the two sets of appeals have been consolidated for hearing.

BRIEF AND ARGUMENT.

I.

The court erred in holding that the orders of the commission were void because they attempt to determine the relation of long and short haul rates irrespective of absolute rates.

The court's conclusions with reference to the validity of the orders were as follows:

With reference to Zone 1, the court say that the commission found that the carriers, upon whom the burden rested, had not proven that rates from points in Zone 1 to the terminals were not less than reasonable *per se;* but nevertheless " the order of the commission as to this territory is not limited to a denial of the applications in the form in which they were presented; that is, to a denial of the maintenance of the then prevailing rates to the coast concurrently with higher rates to the interior points. It forbids the carrier to maintain *any* coast rates lower than the contemporaneous intermediate rate to these points," and hence the orders as to that zone are void. (No. 883, R. 344–5.)

And finally: " But neither the equality of rates on shipments from Zone 1 nor the relation between the rates on shipments from the other zones, as fixed in the order of the commission, can be sustained upon any such considerations. In so far as the commission attempts thus to determine the relation of the long and short haul rates, irrespective of absolute rates, it goes beyond any authority that

has been vested in it, for it is not in the power of the commission to say that a 100 per cent, 107 per cent, or any given percentage of an unknown less than reasonable rate to the coast is necessarily a maximum reasonable and nondiscriminatory rate from the same point of origin to an interior point." (No. 883, R. 346.)

It is obvious that the Commerce Court has restricted the power of the commission to a narrow line of action, and has deprived it of the power to exercise a broad latitude of discretion as to the manner in which it may grant relief from the hard and fast rule of the 4th section, which the terms of the proviso are amply broad enough to allow.

We submit the court was in error for the following reasons:

1. *The language of the act is broad enough to vest in the commission the power to fix a relation between long and short haul rates without reference to the absolute rates.*

The language of the proviso is as follows: " Provided however, that upon application to the Interstate Commerce Commission such common carriers may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; *and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section.*"

There is certainly nothing in this language which requires, or even authorizes, the commission to fix an absolute rate, or prohibits the commission from fixing the relation that shall exist between the charges for the long and short hauls. When the application for relief is made by the carrier, the first inquiry for the commission is whether the carrier shall be excepted therefrom at all. If it is found that the carrier should not be excepted, apparently all that the commission is required to do is to deny the application, which is equivalent to saying that the carrier can not, regardless of the rates then charged, or any rates that may thereafter be adopted, make a greater charge for the shorter haul.

If, on the other hand, the commission finds that the carriers should be relieved from the operation of this section, then it should prescribe "*the extent to which*" relief should be granted, which implies that the commission should prescribe the relation between the rates applicable to the points, rather than the absolute rates to be charged.

Certainly, therefore, if the holding of the Commerce Court is sustained, it must be for some reason which appears elsewhere than in the language of the proviso.

2. ***The records disclose no reason which renders it impossible for the commission to declare what relation the rates for the shorter hauls shall bear to those for the longer hauls, without fixing the absolute rates for either of the hauls.***

The conclusion of the court that "it is not in the power of the commission to say that 100 per cent, 107 per cent, or any given percentage of an *unknown* less than reasonable rate to the coast is necessarily a maximum reasonable and nondiscriminatory rate from the same point of origin to an interior point" (No. 883, R. 346), rests on the assumption that the less than reasonable rates to the coast, which is the basis of the maximum reasonable and nondiscriminatory rates to the interior points, are not known to the commission, *when in fact they are known.*

In the first place, inasmuch as the carriers have assigned as a reason why they should be excepted from the provisions of the 4th section that the present terminal rates have been fixed by competition, it is legitimate to assume that they are the rates which are necessary to obtain the traffic and yet bring some returns over cost; and it was a question of fact for the commission to determine whether there was any probability of the conditions which brought about this unreasonably low rate materially changing within a reasonable time.

But let it be conceded, for the sake of the argument, that the mere fact that the present rates now exist is not sufficient to justify the commission in taking them as a basis for the estimation of lower rates to the interior points, yet it was for the commission to consider the water rates to the terminal points, the probability of those rates being reduced, the absolute cost of service by rail in transporting

goods from the East to the terminal points, *and therefrom determine the lowest rate which the railroad carriers would be required to make in order to secure the traffic, and also the lowest rate they could charge and yet receive some returns over cost of service.*

Furthermore, it was the commission's duty to consider the existence and character of the water competition from the Atlantic coast and also from oriental ports, the relations between the terminal points and the interior points and their relative positions with reference to the points of origin in the East, the interest of the terminal towns and cities and those of the interior, and determine therefrom what would be relatively reasonable and nondiscriminatory rates as between the terminal points and those of the interior. There is nothing in the record to indicate that all those evidential facts were not fully considered by the commission. To the contrary, their reports disclose that each of them was given careful consideration. Therefore the presumption maintains that, *when the order was made the commission did know the lowest rates the carriers could be permitted to make to the terminal points, and knew what relative rates would be nondiscriminatory between the terminal and interior points, and had therefore the knowledge of every fact which was essential to the determination whether from any part or zone of the United States a greater charge over any rates that might be made to the terminal points should be al-*

lowed to the interior points, and if so, what per cent greater the charge might be.

3. *The order of the commission is not only lawful, but it is the most appropriate one that could have been made.*

The Commerce Court does not undertake to prescribe the kind of order which it is proper for the commission to make under the 4th section, but it appears to suggest that some absolute rate must be fixed to the terminal points to form a basis for the estimation of the rates to the interior points. But there is no provision in the statutes authorizing the commission to fix an absolute rate. By section 15 the commission is empowered, where questions of rates are presented, to fix a rate "as the maximum to be charged;" and the proviso in section 4 certainly implies no such power, as the commission is thereby authorized only: First, to determine whether the carrier should be excepted from its provisions, and second, if he should be, to prescribe *the extent to which* the carrier may be relieved from its operation. Then, what kind of an absolute rate can the commission adopt as a basis? Suppose it should fix a maximum rate of $1.00 to the terminals, and a maximum rate of 7%, 15% or 25% additional to the interior points from the several zones designated by the commission. In that event the order would be open to precisely the same criticism to which it is now subjected by the Commerce Court, because the carriers might be under such an order—as it is said they may be

under the present order—forced to reduce their rates to the terminals in consequence of the water competition, which would carry with it the rates to the interior points, and the extent of this forced reduction would be as much unknown to the commission as it was when the present order was made. Such an order would, in fact, be more disadvantageous to the carriers, because as it is they have the option of raising their coast rates and thereby increasing their rates to the interior.

Suppose again the maximum rates to the interior points be fixed and the maximum rates to the coast be estimated by percentages thereof. Such an order would permit the terminal rates to be reduced without any reduction to the interior, and hence would not prevent discrimination between the two points unless the rates to the interior be made so low that those to the coast could not be reduced below the prescribed percentages. Moreover, as, in the absence of such a low rate, the carriers could reduce their coast rates without reducing those to the interior, such an order would not prescribe the *extent* of the relief from the 4th section, which the commission is, under the proviso, expressly required to do.

Again, suppose that the commission undertake to fix a minimum rate to the coast as a basis upon which to compute rates to the interior points. That would require the commission to determine from the nature of water competition and the cost of

transportation by rail to the coast the lowest rates to which the carriers can be forced and at the same time receive some return over costs, which was precisely what the commission had to, and did do, when it made the present order. The same knowledge would be required of the commission to make the one order as the other, the only difference being in the form of the order, the one naming the minimum rate at the coast, while the other does not. But the commission is given by the statute no authority to fix a minimum rate unless it be implied in the proviso of the 4th section; and if such a power is there implied, certainly the power is also implied to make an order in a slightly different form, but accomplishing the same results.

In the Commerce Court counsel for the carriers insisted that the proper method was, when an application to be relieved from the requirements of the 4th section is made by a carrier, for the commission to answer by a simple "yes" or "no." If they answer "yes," then the carrier must be left to prepare a scale of rates, and submit them to the commission for approval or rejection. And it was insisted that for the commission in the first instance to establish a set of differentials was equivalent to the inauguration by the commission of a scheme of rates. But how could such a course have benefited the carriers in this instance? Suppose the commission had answered "yes" as to Zones 2, 3, and 4, the carriers would undoubtedly have presented the same scale of rates which were then in force.

The commission would then have determined that the proper differentials between rates to the terminal points and those to the interior as to those zones are 7, 15, and 25 per cent, respectively, and would have so ordered; and against the order made in this circuitous way the carriers would have filed a petition relying upon substantially the same grounds as are presented in the present petitions. In fact, that was the method which was in effect pursued. The carriers presented with their applications their schedules of rates and asked "*for authority to continue all rates shown in the above-named tariffs from eastern shipping points designated to the Pacific coast terminal points and other points designated lower than rates concurrently in effect from intermediate points.*" (No. 883, R. 50.) Hence the carriers did not propound the simple question whether they could charge more for the shorter haul, but submitted a complete schedule of rates which they proposed to charge. Since the carriers skipped the first step and thus rendered it unessential—if in any event it could have been essential—they are certainly in no position to insist that the action of the commission is void because they overlooked it.

But what else could the commission have done than it did? Rates were submitted from every eastern point to every western point, both terminal and interior. They considered the extent and character of the competition at the terminals, the relation between the terminal and interior points,

the cost of service rendered by the carriers to each, the welfare of the various cities involved and also of the carriers, and then answered that they had no power to fix rates, but did have the power to determine *to what extent* they should grant relief from the general rule of the 4th section, and that a deviation greater than the percentages stated would constitute an unjust and unlawful prejudice against the interior cities. This was purely a question of fact for the commission, and not reviewable unless the finding of the commission effects a confiscation of property. The order of the commission does not fix rates as contended. It only determines how far the interior cities can be discriminated against. The commission expressly repudiated the idea that it intended to fix rates, as appears from the following language of Commissioner Prouty:

> It may be asked why the schedule of rates suggested by the commission as reasonable should not be ordered in. *The answer is that carriers should be permitted in so far as possible to adjust their own tariffs and that it seems probable that in compliance with this order carriers must establish rates in substantial accord with those suggested by us. It should be ever borne in mind that the acute complaint in this case is the discrimination and not the unreasonable rate.* Obedience to this order will doubtless result in some rates from the east which are higher

and in other which are lower than those suggested by the commission since we did not then feel at liberty, as the complainants requested, to make the Spokane rate depend upon the coast rate. But it is likely that the resulting schedule will be more satisfactory to the complainants and no more burdensome upon the defendants. If the carriers establish under this disposition of the case rates to Spokane which are excessive, a further order can be made in this proceeding reducing them to a proper basis. (No. 883, R. 191–2.)

4. *The order is certainly not invalid in so far as it denies permission to the carriers to charge a greater sum for the shorter than for the longer haul within Zone 1.*

After a full review of the competition existing at the coast, market competition between the eastern cities, and all other pertinent facts, Commissioner Prouty said:

> If, therefore, the fourth section were to be applied, having reference to this contention of the complainants alone, we must hold that from the Missouri River and corresponding territory no higher rate should be charged to Spokane and Spokane territory than to the coast, but that from Chicago and territory east of the Missouri River generally a higher intermediate charge might be made. (No. 883, R. 180.)

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Likewise, after a most exhaustive discussion of the various circumstances entitled to consideration, Commissioner Lane concluded:

> We have decided that the transcontinental carriers serving Reno and other points upon the main line of the Central Pacific shall make no higher charge upon any article carrying a commodity rate than is contemporaneously in effect from Missouri River points, such as Omaha and Kansas City, to coast terminal points. This principle we shall also expect to be applied on commodity rates to all main-line intermediate points in Nevada and California. (No. 883, R. 129.)

These findings of fact were conclusive. But the Commerce Court based its holdings as to this zone upon the highly technical ground that the order of the commission was not limited to a denial of the applications "*in the form in which they were presented;* that is, to a denial of the maintenance of the then prevailing rates to the coast concurrently with higher rates to the interior points. It forbids the carrier to maintain *any* coast rate lower than the contemporaneous intermediate rate from these points." The applications of the carriers are not here stated by the court with entire accuracy. It is true that in the first paragraph they applied for permission to continue the schedule of rates mentioned therein, but in the second para-

graph they declare that the application is based upon the desire of the interested carriers to continue the present method of making rates lower at the more distant points than at the intermediate points.

However, the statute does not so restrict the power of the commission that it can only say: *If the carrier maintains a specified rate for the longer haul,* he can't charge more than that rate for the shorter haul. It contemplates that the commission can answer that no higher rates can be charged for the shorter haul, *regardless of what the rates actually charged for the longer haul may be.* The commission is not governed in considering an application under section 4 by the rates actually charged by a carrier; *they deny or grant the application upon the ground that its allowance will or will not work an unjust discrimination.* Nor is the form of the order material. It is sufficient if the substance is such that the merits of the matter are reached. That the commission should be bound by no technical rules is forcibly expressed in the following language of this court in *Interstate Commerce Commission* v. *C. R. I. & P. Ry. Co.* (218 U. S. 88, 103): "The outlook of the commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult,

the means of solving them are as great and adequate as can be provided."

5. Whether or not the carriers should be relieved from the rule of the 4th section, and if so, to what extent relief should be granted, presented questions of fact, and the answer of the commission thereto was conclusive.

That the applications of the carriers did present purely questions of fact we have endeavored heretofore to show.

No attempt to analyze the exhaustive and very able reports of the commission, which were prepared by Commissioners Lane and Prouty, could do them justice, but they must be read for the scope of the inquiry made by the commission, and the care with which it was made, to be fully comprehended. These reports certainly show that it is not necessary to resort to any presumption that the commission performed its entire duty, but that no circumstance or condition having any legitimate bearing upon the questions, however remote, was overlooked by them, and that they were guided in their consideration of the facts by a correct understanding of the law. The record demonstrates that Mr. Commissioner Lane stated the truth when he said (No. 883, R. 129), " We desire to be extremely conservative in this the first application of the new law, and record an adjustment of rates that will be safely within the zone of our discretion.'

II.

In its statement of principles which should guide the commission in the consideration of applications under the 4th section, the court erroneously held, that when the rate for the longer haul is forced unreasonably low by competition, the only elements that can enter into the consideration of the rate for the shorter haul are its reasonableness and the extent to which it ought fairly to be influenced by the same competition which forced the rate for the longer haul.

The opinion of the Commerce Court is devoted largely to a discussion of the principles by which the commission must be governed in considering applications for relief under section 4. As these principles were stated for the guidance of the commission in a further consideration of the applications here involved and of all applications which shall be hereafter presented, it is a matter of great importance that they be reviewed and their correctness be determined by this court. The observations of the court are in substance as follows:

(1) In *East Tennessee, etc., Ry. Co.* v. *The Interstate Commerce Commission* (181 U. S., 1) it was held that the 3d section of the act was directed against undue discriminations and preferences arising from the voluntary and wrongful act of the carrier, and not to a discrimination which is forced by competition. Hence, if, for example, a rate from New York to Seattle is unreasonably low because of water competition, and one from St. Paul to Seattle is unreasonably low because otherwise the

St. Paul merchant would be unable to sell in competition with the New York merchant, but in each instance there is some remuneration to the carrier above the cost of service, Spokane has no legitimate ground of complaint provided its rates are within themselves reasonable. This is so, it is said, because the competitive conditions at Seattle which have caused the lesser rate would produce the same preference even though the carrier were forbidden to meet the competition. Therefore, the court say, "No unjust prejudice to Spokane and other interior points can now be predicated merely on the fact that the rate from any of the eastern territory is less to the Pacific coast terminals than to the intermediate points." (No. 883, R. 344.)

(2) When the commission finds that a greater charge for the shorter than for the longer haul is justifiable it is bound, in order to sustain the constitutionality of the act, not only to permit the carrier to charge less for the longer haul, but as much less as it pleases, provided it does not violate any other provision of the act; and the commission should also, by virtue of its authority to fix reasonable rates, *fix the short-haul rate.* Doubtless the commission may also make relative rates in so far as necessary to prevent an undue preference; for while a lower rate to the more distant point forced by competition can not within itself constitute an undue preference, yet the nearer point should receive advantages to the extent that the rate to that point ought fairly to be influenced by the competi-

tion at the other point. For illustration, if the St. Paul-Seattle rate be made less than reasonable, though remunerative, to meet the forced New York-Seattle rate so that St. Paul can compete with New York at Seattle, Spokane could complain of undue prejudice if the St. Paul-Spokane rate were made higher than the New York-Spokane rate, whereby competition between those cities would be prevented at Spokane. So Spokane is entitled to a rate from New York not greater than the rate to Seattle plus the back haul from Seattle to Spokane, as that is the measure of Spokane's disadvantage of location. (No. 883, R. 346.)

The position of the court, briefly stated, is, that when the commission found that the rate to Seattle was forced by competition, all question of discrimination was eliminated, except the extent to which the rate for the haul to Spokane should be affected by the *same* competition which forced the rate to Seattle, and independent of that exception, the rate to Spokane had to be made reasonable *per se*. In other words the commission could not consider the fact that Spokane is located four hundred miles nearer the points of shipments than Seattle, the relative positions of the two cities to certain territory lying in the immediate vicinity of Spokane, and in which Seattle could undersell Spokane, and the welfare of Spokane as well as that of Seattle; in short, that none of those elements which are ordinarily considered in determining whether undue preference or discrimination exists could be

looked to except the extent to which the rate for the haul to Spokane should be effected by the *same* competition which forced the rate to Seattle.

This view resulted from a failure to give proper effect to the amendment of June 18, 1910, and in construing sections 3 and 4 as they were construed by this court in *East Tennessee, Virginia & Georgia R. R. Co.* v. *Interstate Commerce Commission* (181 U. S., 1), before the amendment was made.

In section 1 Congress declared the general principle that "All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable." This is the general principle underlying the entire act; but Congress did not specify what elements should be considered in determining whether a charge is just and reasonable. Section 3 provides " That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or, locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." This is an implied declaration that a charge for any service which gives an undue or unreasonable preference, or engenders an undue or unreasonable prejudice, can not be a

reasonable charge within the meaning of the first section; but no definition is here given of the words "undue" and "unreasonable."

The discrimination arising from charging more for a shorter than for a longer haul was so prevalent and of such character that Congress thought that it should be dealt with specially, and hence enacted the 4th section, which originally provided "That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, *under substantially similar circumstances and conditions,* for a shorter than for a longer distance," &c.

Much confusion arose in the minds of the commission and of the courts as to what effect should be given to the phrase "under similar circumstances and conditions;" and the numerous cases bearing upon that subject are cited and reviewed by Commissioner Prouty in the report upon which the order attacked in case No. 884 is based. (No. 883, R. 149.) The several questions relating thereto were finally settled by this court in *East Tennessee, Virginia & Georgia R. Co.* v. *Interstate Commerce Commission* (181 U. S., 1), which case is here relied upon by the carriers and upon which the Commerce Court mainly rested its decision. That case arose out of a complaint filed before the commission on behalf of Chattanooga, wherein it was complained that the defendant company was charging

less for hauling goods through Chattanooga to Nashville than for hauling the same goods to Chattanooga. It developed that there were two schedules of rates, a northern and a southern, the former of which was the lower. Nashville was given the advantage of the northern rates by the Louisville & Nashville Railroad, and in order to meet this reduced rate the East Tennessee, Virginia & Georgia road also charged the northern rate to that point, while maintaining the southern rate to Chattanooga. The commission did not determine whether the defendant company was justified in charging more for the shorter than for the longer haul, but held that notwithstanding the competition at Nashville the company could not make the less charge to Nashville without first applying to the commission and obtaining an order granting it permission to do so. This court held that if the circumstances and conditions at Nashville were substantially dissimilar from those at Chattanooga, section 4 had no application whatever, and the carrier had the right at his own risk to determine whether that section was applicable. In the course of the opinion the court, speaking through Mr. Justice (now Mr. Chief Justice) White, in discussing the meaning of the 3d section and its relation to the 4th section, said:

> It is not difficult to perceive the origin of the fallacy upon which the contention (that competition can not produce a dissimilarity of conditions within the meaning of the 4th

section, if a discrimination arises from the less charge for the longer haul) rests. It is found in blending the third and fourth sections in such a manner as necessarily to destroy one by the other instead of construing them so as to cause them to operate harmoniously. In a supposed case when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates can not be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply. The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the *Behlmer* case, in the passage which we have previously excerpted. To

otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it can not be that the availing of this right is the cause of the preference, and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination.

The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it. We say seemingly on the one hand and apparently on the other, because in the supposed cases the preference is not "undue" or the discrimination "unjust." This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and dis-

> crimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge (pp. 18, 19).

Here the same construction was given to the 4th section as is given by the Commerce Court in the present case. If the charge for the shorter haul is reasonable within itself, and there is substantial competition at the more distant point, the preference is not undue. But the reason why this court then held that the preference was not unlawful under such circumstances appears in the latter part of the quotation, wherein it is said that competition which " exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition *provided by the statute,*" and " the lesser charge upon which both the assumption of preference and discrimination is predicated is *sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge.*" That is, by making the applicability of section 4 to depend upon the substantial similarity of conditions at the two points *Congress, by implication, declared that when the conditions were substantially dissimilar—as when competition existed at the more distant point—the lesser charge for the longer haul was not an undue preference; and that those circumstances which rendered the conditions dissimilar could not be considered in determining whether the preference was undue.*

After this decision the commission treated section 4 as a practical nullity, and we fail to find where any further effort was made to enforce it.

With this decision in mind, Congress thought that vitality could be given this section by simply striking out the phrase "under substantially similar circumstances and conditions," and amended it accordingly.

The carriers insist that the only effect of this amendment was to require them to take the initiative, and the Commerce Court say: "The practical change thereby produced in section 4 was to compel the carriers to make application to the commission if they desired to continue this practice." (No. 883, R. 343.) But certainly Congress had no such intention. As said by Commissioner Prouty (No. 883, R. 165), "Many complainants were ready and anxious to initiate such proceedings, and many complainants did initiate such proceedings, only to be told that the commission had no authority to grant relief, even though it were of the opinion that such relief should be granted." Section 4 certainly can not now mean that when the carrier proves that there are competitive conditions existing at Seattle which do not exist at Spokane, the commission *must* permit the carrier to charge more for the haul to Spokane than for the haul to Seattle.

As shown by the above-quoted language of this court, it was the phrase which was stricken out by Congress that gave that meaning to the section. Without that phrase, can sections 3 and 4 when read

together have the meaning contended for? Section 3 prohibits the carrier from giving an undue preference, or to subject a person or locality to an undue prejudice. Section 4 prohibits the carrier from charging more for the shorter than for the longer haul, but authorizes the commission, after investigation, to relieve the carrier from this requirement and to prescribe the extent of the relief. Reading the two together, the commission must determine whether it would be undue discrimination between the localities to permit the greater charge for the shorter haul. But there is now not a word in the act suggesting that any one element shall be given any special weight, whereas before the amendment *the existence of any element which made the circumstances and conditions at the more distant point substantially dissimilar from those at the nearer point was conclusive that no discrimination arising from that element was undue or unjust.*

The commission must consider the existence of competition, but not for the purpose of determining whether the circumstances and conditions at that point are substantially dissimilar, *but along with every other material fact to determine whether the greater charge for the shorter haul is an unjust discrimination.*

When the commission is considering an application under the fourth section it takes precisely the same general view as it would if considering a charge of discrimination between two cities when the haul to one is not included in the haul to the

other, which charge would rest upon the third section.

The courts have never undertaken to specify all the elements that may be considered in determining what constitutes undue preference or prejudice; but in *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission* (162 U. S., 197) this court laid down the general principles governing the commission in the following language:

> When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. *The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question.* The same observations are applicable to the fourth section, or the so-called long and short haul provision, and it is unnecessary to repeat them (p. 220).

And again on page 233:

> That, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying com-

panies as of the traders and shippers, *and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment.* That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies *and the welfare of the community which is to receive and consume the commodities are to be considered* (pp. 233, 234).

In *East Tennessee, &c., Ry. Co.* v. *Interstate Commerce Commission, supra,* subsequent to the part heretofore quoted, it is shown that even before the amendment of June 18, 1910, cases could arise wherein the existence of competition would not be conclusive. It was there said:

> That, as indicated in the previous opinions of this court, *there may be cases where the carrier can not be allowed to avail of the competitive condition because of the public interests and the other provisions of the statute, is of course clear. What particular*

> *environment may in every case produce this result can not be in advance indicated.* But the suggestion of an obvious case is not inappropriate. Take a case where the carrier can not meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency towards unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places (pp. 19 and 20).

So in *Louisville and Nashville Railroad Company* v. *Behlmer* (175 U. S., 648), which arose out of a complaint filed before the commission by one Behlmer, a wholesale hay and grain dealer at Summerville, South Carolina, in which he claimed that he was charged more for a shorter haul between Memphis and Summerville than was charged for the longer haul between Memphis and Charleston, and which, therefore, directly involved the 4th section, in determining what the carrier should take into consideration when considering whether he might charge more for the shorter than for the longer haul, the court said:

> It follows that whilst the carrier may take into consideration the existence of compe-

tition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First. The absolute command of the statute that all rates shall be just and reasonable and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may in many cases be involved in the determination of whether competition was such as created a substantial dissimilarity of condition. Second. That the competition relied upon be not artificial, or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making the right in every event to be only enjoyed *with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered.* If, then, we were to undertake the duty of weighing the evidence in this record, we would be called upon, as a matter of original action, to investigate all these serious considerations which were shut out from view by the commission and were not weighed by the Circuit Court of Appeals, because both the commission and the court erroneously construed the statute (pp. 674, 675.)

But it is said if the carrier holds the charges for the shorter haul up to a point where they are reasonable within themselves, and is not permitted to charge less for the longer haul, he can not meet the

competition at the more distant point, and hence will lose money he would otherwise have made; while if he reduces the rate to meet the competition, he will lose money because he can not charge a reasonable rate for the shorter haul.

Those are material considerations, and must be, and the record in this case shows they were, taken into consideration by the commission. On the other hand, if the greater charge for the longer haul is allowed, the business of the locality discriminated against will suffer, and this must also be considered. The interests of neither the carriers nor of the communities affected are entitled to the whole consideration, but there must be a just and reasonable compromise between the two. Carriers are public servants and must conserve public interests though it be to their own detriment.

It is again said, even by the Commerce Court, that if the carriers are not permitted to meet the competition at Seattle no advantage can accrue to Spokane, as the same rate would still be maintained to Seattle by water. There are two answers to this suggestion. First, it is claimed that the rates to Seattle are the result of competition between the railroads and water lines. If this be true, and the competition of the railroads be wholly or partially withdrawn, the charges by water to Seattle will naturally be raised, and the discrimination between it and Spokane thereby lessened. Second, it was a question of fact for the commission to

decide whether the carriers by rail can meet competition at Seattle and still receive something like a reasonable return for services rendered in hauling to Spokane, though prohibited from charging more for such haul than for the haul to Seattle. If they can haul to Seattle and make *some* money at their present rates to that point, which they say they are doing, what must be thought of the suggestion that they would not make a reasonable return for the services rendered in hauling to Spokane, a distance shorter by four hundred miles, a part of which is through a mountain region?

Furthermore, the Commerce Court recognizes throughout its opinion the validity of the blanket rates now existing from the 2d, 3d, and 4th zones to the Pacific terminals, which rest on the theory that in order to promote the public welfare it is legitimate for the railroads to grant the same rates to manufacturers of St. Paul, Chicago, and New York, in order that the manufacturers of each of these places may be able to compete with those of each of the others, although on account of its location on the ocean New York has a natural advantage over either Chicago or St. Paul, and because of its proximity by rail to the Pacific coast St. Paul has an advantage over Chicago. The statute justifies no distinction between the two ends of the lines—that is, between the purchasing jobbers on or near the Pacific coast and the selling manufacturers in the East and Middle West. The same

principles must be applied to all peoples and in all sections.

Let the rigid rule of the court be applied, and what becomes of these blanket rates? In the first place the commission must allow a rate from New York to the Pacific coast that will get traffic against water competition, provided it will bring some return over cost. Again, as St. Paul is less favorably situated than New York and has no water competition, it has no just ground of complaint at the New York rate, provided it is given a rate reasonable within itself; and as the commission is bound under such circumstances to fix the St. Paul rates by the 1st section, it must give to St. Paul nothing but a reasonable rate to the Pacific coast. Likewise, as Chicago is practically unaffected by water competition, it can be given nothing but a rate reasonable within itself, which must be greater on account of its location than the St. Paul rate.

If there is such a thing as a legitimate rate growing out of market competition between New York and St. Paul, why can not there be a legitimate rate growing out of market competition between Spokane and Seattle at the other end of the line? If a forced water competition rate at New York can be legitimately met by the carrier from St. Paul, why can not a forced competitive water rate to Seattle be legitimately met by the carrier at Spokane? And if it can be met by the carriers, it necessarily follows that it can be lawfully fixed by the commission.

III.

The order of the commission is not invalid, because the United States is thereby divided into zones, and the relative rates are fixed with reference to such zones.

As a matter of fact, the railroad carriers themselves divided the United States into these same zones. (See statement of Commissioner Prouty, No. 183, R. 189.) Furthermore, this record shows that they have made a blanket rate to the western terminals covering half of the United States, which is equivalent to making a zone of that extent. The blanket rate system has for many years been in use by the railroad carriers, and its validity was recognized by the Commerce Commission in *Business Men's League of St. Louis* v. *Atchison, Topeka & Santa Fe Railway Co.* (9 I. C. C., 318). If the contention upon this feature is correct, then it would be necessary to make a scale of rates which would gradually increase as the distance increases from the Pacific to the Atlantic coasts. In *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway Co.* (218 U. S., 88, 104), it was intimated, and in effect held by this court, that the creation of zones by the commission did not fall within their power, but the character of zones there under consideration were entirely different from the zones here declared by the commission. There it was insisted that the commission had attempted to apportion out artificially the country into zones tributary to given trade

centers, and noncontributary to others; that is, that they had adjusted rates in such a way as to secure the trade of certain localities for certain trade centers, without reference to the reasonableness of rates.

IV.

The orders of the commission are not void on the ground that they do not dispose of special cases within the meaning of the proviso.

It appears to be the view of Judge Archbald that the territory under consideration was too large, and the points involved were too numerous for these applications to present special cases within the meaning of the statute, and that, therefore, the proceedings and order of the commission were not only irregular, but were absolutely void.

In the first place, no rule as to what constitutes a special case can well be laid down, but each application has to be considered with relation to its peculiar circumstances. Here was a peculiar situation. A number of complaints had been previously presented to the commission, and every phase of the situation and all the circumstances applicable to every part of the territory involved had been carefully examined and considered by the commission. While a number of transcontinental lines were involved, yet practically the same conditions and circumstances applied to each, and a determination of the matter as to one line was substantially a determination as to all. The same may be said with ref-

erence to the various points on each line. When it was determined what the relative rates should be between one interior point and a terminal, it was a determination what the relative rates should be between all the interior points and terminals.

But a fact which should be taken as conclusive against the carriers is that *they presented their applications precisely as they were considered and determined by the commission.* That is, in their applications they presented rates in bulk applying to all points on a number of lines, and asked the commission to consider all these rates together. To these invitations the commission responded in the same manner in which they were presented, and passed its orders accordingly. Now, certainly these carriers can not take advantage of their own mistake, if one was committed. They can not insist that orders based upon these applications and following them precisely are void, and at the same time insist that the applications themselves are valid. As was said by this court in *Interstate Commerce Commission* v. *C. R. I. & P. Ry. Co.* (218 U. S., 89, 109), in referring to an attack made by the carriers upon an order of the commission based on a condition which they had created, "It is somewhat strange that that which was done in the interest of the carriers should be brought forward by them to attack the action of the commission." But if the applications are void, then the statute became obligatory upon the expiration of the six months'

time allowed by the statute for the presentation of applications, and the Commerce Court is without power to enjoin the operation of the statute.

V.

The allegations of the petitions wholly fail to show that the carriers have been deprived of their property without due process of law within the meaning of the Constitution.

The allegations of the petition in case No. 883 upon this point are contained in paragraphs 16, 17, 18, and 20, and are as follows:

Paragraph 16 reads:

> Assuming said section 4 of said act to regulate commerce as amended by said act of June 18, 1910, to be a constitutional enactment, the order of the commission of July 31, 1911, deprives your petitioners of their constitutional right to engage in the business of carrying traffic to said Pacific coast terminals, in that it forces your petitioners either to forego said traffic or to obtain the same at the expense of lowering their rates to intermediate and other interior points so as to make said rates to said points less than your petitioners are rightfully entitled to receive, *and unless said order of July 31, 1911, shall be set aside and annulled by this court, your petitioners can continue in the business of carrying traffic to said Pacific coast terminals only by reducing all rates to intermediate territory to a point where the same shall be less than your petitioners are rightfully entitled to receive.*

In paragraph 17 it is alleged that while petitioners may continue to charge reasonable rates to the interior points, they can only do so by raising rates to the terminals, and—

> That to so raise their rates to Pacific coast terminals would make such Pacific coast terminal rates greatly in excess of the competitive rates to said terminals hereinabove described and would cause to be diverted to the water carriers and lost to your petitioners practically all of the traffic now moving over the lines of your petitioners to said Pacific coast terminals, and while this effect would not be immediate because the number of vessels now available for this service is not sufficient to carry the whole of such traffic, *such an advance would result in the immediate loss to your petitioners of a large part of said terminal traffic and in the ultimate loss of practically the whole thereof as soon as vessels could be built and equipped to carry the same.*

In paragraph 18 it is alleged that the present rates to the terminals bring some remuneration over cost, and that the order of the commission—

> *in requiring your petitioners to forego said terminal business or to reduce their rates to interior points below the just and reasonable rates which they are entitled to charge will result in the taking of your petitioners' property without due process of law and is confiscatory and void;*

and that if they should comply with the order by depressing rates to intermediate points so that they should not exceed the per cent above rates to the terminals as required—

> your petitioners would be required to accept the business moving to interior points at rates so low that the entire revenue therefrom, together with all other revenues accruing to your petitioners, *would not be a fair return upon the fair value of your petitioners' property devoted to the public service.*

In paragraph 20 it is alleged that—

> To comply with the order of the commission upon said applications your petitioners will be obliged to readjust rates now in effect from Missouri River territory and all points east thereof, either by raising rates to said terminal points and thus diverting and losing terminal traffic to competitive water carriers or by lowering rates to intermediate and other interior points upon their respective lines to less than reasonable rates, and will be forced to move traffic in accordance with such changed rates *and will lose a large amount of revenue to which they are lawfully entitled and which they will be unable thereafter to demand or collect.*

The allegations of the petition in case No. 884 on this subject are contained in sections 16 and 18, and while not so extended as the allegations in the petition in No. 883, they are in effect the same.

The petitions, therefore, contain no statement showing the amount the companies receive from

the present rates, or how much they would receive if the order of the commission were put into effect, or the amount of profits that is now realized by the carriers on their investment, or the amount they would receive provided the order of the commission were enforced. They, by implication, admit that under rates which would comply with the commission's order they would make a profit, but allege no facts by which even the proximate amount of such profit can be estimated, declaring only that the revenues they would receive "would not be a fair return upon the fair value of your petitioners' property devoted to the public service." The judgments of different persons as to what constitutes a fair return upon one's investment are quite diverse. One person may believe that 4 per cent or even 3 per cent on an investment of many millions is a very reasonable return, while others may take the view that nothing less than 10 per cent is a fair return, and that even 15 or 20 per cent would not be unreasonable. The reports of the commission rather indicate that petitioners belong to this latter class. The various cases decided by this court in which the question as to what constitutes a confiscation of property by reduction of the amount of a company's income is summarized by Mr. Justice Moody, speaking for the court, in *Knoxville* v. *Knoxville Water Company* (212 U. S., 1), in the following language:

> It can not be doubted that in a *clear case of confiscation* it is the right and duty of the

court to annul the law. Thus in *Reagan* v. *Farmers' Loan & Trust Company* (154 U. S., 362), where the property was worth more than its capitalization, and upon the admitted facts the rates prescribed would not pay one-half the interest on the bonded debt; in *Covington, etc., Turnpike Co.* v. *Sandford* (164 U. S., 578), where the rates prescribed would not even pay operating expenses; in *Smyth* v. *Ames* (169 U. S., 466), where the rates prescribed left substantially nothing over operating expenses and cost of service; and in *Ex parte Young, supra,* where, on the aspect of the case which was before the court, it was not disputed that the rates prescribed were, in fact, confiscatory, injunctions were severally sustained. But the case before us is not a case of this kind. Upon any aspect of the evidence the company is certain to obtain a substantial net revenue under the operation of the ordinance. The net income, in any event, would be substantially 6 per cent, or 4 per cent after an allowance of 2 per cent for depreciation. (See *Stanislaus County* v. *San Joaquin Company,* 192 U. S., 201.) We can not know clearly that the revenue would not much exceed that return. We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation. Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculations as to its ef-

> fect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. *It is enough that the whole case leaves us in grave doubt* (pp. 17, 18).

If the case were put at issue, and the evidence introduced on behalf of the carriers left the case in precisely the same condition in which it is presented in this petition, the court would necessarily refuse to hold that there had been any confiscation of property by this order of the commission; and certainly a defect which would be fatal in the evidence is fatal in an original bill or petition.

Furthermore, in No. 883, the joint petition was filed by seventeen railroad companies; in No. 884 the joint petition was filed by eleven railroad companies. The two petitions embrace all the lines extending from the Great Lakes to the Pacific Ocean, including lines in the Dominion of Canada. Courts take judicial notice of the existence, location, and operation of railroads. (16 Cyc., 861.) The proposition that the joint properties of all the companies owning and operating half of the railway mileage of the United States will be confiscated by the order of the commission, if allowed to become effective, can not successfully be maintained by oaths supporting such general allegations as are contained in these petitions.

VI.

The Court of Commerce had no power in its final decree to enjoin the Government officials from prosecuting the carriers for a violation of the 4th section of the statute, or to in any way exempt the carriers from criminal liability under that section.

In re Sawyer (124 U. S., 200, 210, 211) this court used the following language:

> The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the Government.

But the court also said:

> The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.

It has also been held that where property rights will be destroyed, unlawful interference by criminal

proceedings under a void law or ordinance may be reached and controlled by a court of equity. (*Davis & Farnum Manufacturing Co.* v. *Los Angeles*, 189 U. S., 207, 218; *Dobbins* v. *Los Angeles*, 195 U. S., 223, 241.) Those cases involved the validity under the 14th amendment to the Constitution of certain city ordinances. The cases on the general subject are collated in a note to *Crighto* v. *Dohmer* (Miss.), (21 L. R. A., 84).

This action of the court in the present case was erroneous, for the following reasons:

1. There is no case in which a court of equity can enjoin or interfere with the United States in its sovereign duty of enforcing its criminal laws. A contrary rule would be fraught with grave danger, as a statute essential to the public welfare might be held suspended for an indefinite time, and until many offenses had been barred by the statute of limitation, awaiting a decision of this court. If a criminal statute is void, the defendant has a complete defense to the prosecution.

2. No such jurisdiction is vested in the Commerce Court.

It may, under section 3 of the act creating that court (act of June 18, 1910, ch. 309, 36 Stat L., 542), when the circumstances justify it, "enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission," but there is no suggestion that it may suspend or annul any legislation by Congress, and much less criminal legislation:

and if petitioners be prosecuted it must be under the provisions of the act and not under the order of the commission. Again, the power to enjoin an order of the commission certainly does not imply the power to enjoin a criminal prosecution before another court .

3. The injunctive order in this respect was wholly gratuitous.

It is not alleged that any criminal proceedings or proceedings to collect penalties are contemplated, and there are no allegations in the petitions upon which it can rest, nor in fact was any such relief prayed for.

VII.

Section 4 of the interstate commerce act is not unconstitutional on the ground that it undertakes to vest in the Interstate Commerce Commission legislative power.

The contention of the carriers is that Congress has undertaken by the proviso in this section to leave it to the commission to determine arbitrarily and without the exercise of a proper discretion whether in any given case the carrier may be relieved from the general rule of the 4th section, and if relieved at all, to what extent, and that, therefore, the entire section is unconstitutional.

This contention can not be sustained for the following reasons:

1. *The first proviso of the 4th section does not undertake to vest an arbitrary power in the commission, but requires them to investigate and exer-*

cise a sound discretion in determining whether an applicant shall be relieved from the provisions of the section; and hence, if no rule for the guidance of the commission in acting under this proviso were found in other sections of the act, this section would not be unconstitutional.

The language of the proviso is that " Upon application to the Interstate Commerce Commission such common carrier may in special cases, *after investigation,* be authorized by the commission to charge less for longer than for shorter distances, etc."

The commission is, therefore, positively required when application is made to *make an investigation* and thereafter to determine whether the relief shall be granted, and if so to what extent, and its power can not, therefore, be exercised arbitrarily or capriciously. That this is sufficient to maintain the constitutionality of this section is shown by the following authorities:

A case specially relied upon by counsel in their argument before the Commerce Court was *Yick Wo* v. *Hopkins* (118 U. S., 356). In that case by an ordinance of San Francisco it was provided:

> SEC. 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the con-

> sent of the board of supervisors, except the same be located in a building constructed either of brick or stone (p. 357).

It appeared that Yick Wo had been found guilty under this ordinance and adjudged to pay a fine of $10.00, and in default of same was imprisoned; and he sued out a writ of habeas corpus to obtain relief from this imprisonment. It also appeared that about 200 Chinamen had applied to the board of supervisors for permission to carry on their business in wooden buildings, neither of which applications had been allowed, while on the other hand about 80 Caucasians had on application been permitted to do the very thing which the Chinamen had been excluded from doing. The Supreme Court of California held that this ordinance vested in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries. This court, however, refused to take that view, but said, "They (the ordinances) seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons;" and again, "The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." The court, however, based the

invalidity of the ordinances upon the provisions of the 14th section, which prohibits a State from denying to any person within its jurisdiction the equal protection of the laws. The clear implication of the language of the court is, that if the board of supervisors had been required to exercise, after due investigation and consideration, a sound discretion, the ordinance would have been valid.

The case of *Wayman* v. *Southard* (10 Wheaton, 41, 42) involved the validity of a rule of court. The act of 1792 subjected the modes of proceding under the laws of the State "to such alterations and additions as the said courts, respectively, shall, in their discretion, deem expedient;" and a rule of the court adopted under this provision, and upon which the validity of an execution depended, was attacked as being invalid, in that Congress had undertaken by this act to vest in the court a legislative power. With respect to this question, the court, speaking through Chief Justice Marshall, said:

> It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going further for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the judiciary act and the 7th section of the additional act empower the courts re-

spectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example, may make rules directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature without the intervention of the courts; yet it is not alleged that the power may not be conferred on the judicial department.

The line has not been exactly drawn which separate those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details (pp. 42, 43).

By section 1547, R. S., it is provided:

> The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner.

This section was taken from the act of July 14, 1862, chapter 164, section 5; 12 Stat., 565, and on April 15, 1870, certain regulations were adopted by the Secretary of the Navy.

Ex Parte Reed (10 Otto, 13–23), was a case which involved the validity of a sentence of a court martial which had proceeded under regulations adopted in pursuance of the statute. The court held that the proceedings were regular. It will be observed that while regulations which had been adopted by the Secretary under a prior act were recognized as valid by this legislation, as to adopting future regulations no rule was enacted for the guidance of the Secretary. Yet the power of the Secretary of the Navy to make regulations under this statute has been recognized repeatedly by this court.

The rules and regulations adopted for the guidance of the Land Office in the administration of the land laws and the repeated decisions of this court sustaining the same, may also be cited in support of the contention of the United States. The statutory authority for the adoption of such regulations is found in the following statutes:

Section 441, R. S.:

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
>
> * * * * *
>
> Second. The public lands, including mines.
>
> * * * * *

Section 453, R. S.:

> The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive

> duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

Section 2478, R. S.:

> The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

These statutes upon their face lay down no rule for the guidance of the Secretary in prescribing the regulations provided for therein, but the character of the regulations appear to be left entirely to his discretion. The case of *Cosmos Co.* v. *Gray Eagle Co.* (190 U. S., 301) involved the validity of certain rules of the Land Office, but the court held that under the foregoing statutes that office has the power to make rules and regulations; and the validity of such regulations has been recognized in numerous other cases.

The case of *Butte City Water Co.* v. *Baker* (196 U. S., 119) was an action of ejectment, involving the validity of regulations passed by the Legislature of the State of Montana. Section 2338, R. S., reads:

> As a condition of sale, in the absence of necessary legislation by Congress, the local

> legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

No direction whatever is here given to the legislature as to how it shall proceed, and what it shall take into consideration in adopting the rules provided for.

Article IV, section 3, clause 2, of the Constitution provides that—

> The Congress shall have Power to dispose of and make all Needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *

This provision expressly places in Congress all power of disposition of public lands of the United States; and yet it was held in the above-cited case that Congress had the power to delegate to the Legislature of Montana certain limited authority to prescribe rules and regulations with reference to the disposition of lands within its borders; and that, although the statute delegating the power contained no directions as to how it should be exercised, the regulations adopted by the legislature were valid.

A late case decided by this court is that of *United States* v. *Grimaud* (220 U. S., 506). The defendants in that case were indicted for grazing sheep on a forest reserve without having obtained the per-

mission required by regulations adopted by the Secretary of Agriculture. A demurrer was filed to the indictment on the ground that the statute which purported to vest in the Secretary power to adopt such regulations was void because Congress had attempted to vest in him legislative power. This view was sustained by the court below, and the indictment was quashed. The statute under which the Secretary was acting provided that "he may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as provided in Rev. Stat., section 5388." The case was twice considered by this court, and when it was finally disposed of the court unanimously held that the act was constitutional, and the regulation was valid.

Many other authorities of a like character might be cited, but these decisions of this court clearly sustain the view, that when a body which is performing only a quasi-legislative function is required to investigate before acting, such body can not act arbitrarily and capriciously, but must exercise a sound discretion, and that a law delegating such power is constitutional.

The power delegated to the commission by the 4th section is only quasi-legislative. The general rule

is declared by Congress, but whether or not an exception shall be made in a particular case involves many facts with which Congress can not possibly be familiar, and which must be ascertained by special inquiry, and hence such a question is peculiarly one to be delegated to a body clothed with the power and so organized as to make a proper investigation.

2. *The 4th section must be read in conjunction with the 1st and 3d sections, and the principles declared in those sections constitute a rule of action for the commission in making their investigation and decision under the 4th section.*

It was not denied by the carriers in the court below that if a rule of action such as that contained in either the 1st or 3d sections applied to the commission in acting under the 4th section, the latter section would be constitutional. But it was insisted, first, that the 1st section could constitute no such rule, because the rates which the carrier is seeking to charge when application is made for relief from the 4th section are confessedly less than reasonable, and hence that a requirement that rates shall be reasonable can not serve as a guide to the commission in fixing rates which must be unreasonable; and, second, that the 3d section, which prohibits undue and unjust discrimination can be no guide for the commission, because in *East Tennessee, Virginia and Georgia Railway Company* v. *Interstate Commerce Commission* (181 U. S., 1) this court held that a rate which is forced

below a reasonable rate by competition is not an unjust rate within the meaning of section 3, and that the prohibition of an unjust rate can not be taken as a rule for the fixing of a rate which this court has said is not unjust. In response to these contentions we say:

(a) *In the cases wherein this court construed section 4 before amended by the act of 1910, it was recognized that sections 1, 3, and 4 should all be construed together, and that the principles declared in the 1st and 3d sections should be kept in view by the commission in determining questions arising under section 4.*

Section 4 was first extensively considered in *Interstate Commerce Commission* v. *Alabama Midland Railway Company* (168 U. S., 144). That case grew out of a complaint made by the Board of Trade of Troy, Alabama, wherein it was complained that certain railroads charged more for a shorter haul to Troy than they charged for a longer haul to Montgomery. The commission made an order favorable to Troy, and the company failing to heed this order a bill was filed to enforce its observance. It was contended by the commission:

> That the existence of rival lines of transportation and, consequently, of competition for the traffic, are not facts to be considered by the commission, or by the courts, when determining whether property transported over the same line is carried under

> " substantially similar circumstances and conditions," as that phrase is found in the fourth section of the act (p. 163).

The court, however, held to the contrary, but in the course of its opinion said (p. 167):

> In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the *third and fourth* sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of " undue or unreasonable preference or advantage," or what are " substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration.

In *Louisville & Nashville Railroad Company* v. *Behlmer* (175 U. S., 648, 674), heretofore cited, which was a case brought by Behlmer to enforce an order made under the 4th section, in speaking of what the carrier should consider in deciding whether that section was applicable, this court said:

> It follows that whilst the carrier may take into consideration the existence of competi-

> tion as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First. *The absolute command of the statute that all rates shall be just and reasonable, and that no undue discrimination be brought about,* though, in the nature of things, this latter consideration may in many cases be involved in the determination of whether competition was such as created a substantial dissimilarity of condition (p. 674).

In *East Tennessee, Virginia & Georgia Railroad Co.* v. *Interstate Commerce Commission* (181 U. S., 1), *supra,* another case involving the 4th section before the amendment of June 18, 1910, the court said:

> *True it is that all of the provisions of the statute must be interpreted together,* and because this is the elementary rule the argument now pressed upon our attention is unsound (p. 17).

And again:

> It is not difficult to perceive the origin of the fallacy upon which the contention rests. *It is found in blending the third and fourth sections in such a manner as necessarily to destroy one by the other instead of construing them so as to operate harmoniously* (p. 18).

This court has, therefore, all the time understood that sections 1, 3, and 4 should be read together. It was likewise so understood by those members of

Congress who were most familiar with the subject when the amendment was made. When Senator Elkins reported the bill approved, June 18, 1910, containing section 4, from the conference committee to the Senate, concerning that section, he said:

> In connection with the adoption of the general language of the House amendment concerning the granting of relief by the commission, and the omission of the specific rules contained in the Senate amendment, it is pertinent to observe that the general rules requiring rates to be reasonable and without discrimination are found in sections 1 and 3 of the interstate commerce act. It is also pertinent to note that under the interpretation placed upon section 3 of the act by the Supreme Court it is proper for the commission, in determining whether rates are discriminatory, to take into consideration the fact that there are dissimilar circumstances resulting from competition by rail or water. (Cong. Rec., p. 8239, vol. 45, part 8.)

(b) *The amendment of June 18, 1910, did not change the principles which guided the commission while acting under the proviso of section 4; and there is no such inconsistency between sections 1, 3, and 4 as necessitates a departure from the general rule that all sections of an act must be read together.*

We have heretofore shown that as construed by this court under section 4, before amended, the car-

rier had the right to determine for himself whether or not the circumstances and conditions at the two points were substantially dissimilar, and that if complaint were made to the commission, the first question presented was whether or not the circumstances and conditions were substantially dissimilar. If they were, that was the end of the matter, unless the discrimination was so great or of such character that it could not be justified by the dissimilarity of conditions. For illustration, where, as said by the court in *East Tennessee, Virginia & Georgia Railway Co.* v. *Interstate Commerce Commission, supra,* the rate to the more distant point was nonremunerative and a burden upon the carrier, or where the difference in the charges for the shorter and longer hauls was greater than was necessitated by the competition at the terminal point; in such cases, in spite of the dissimilarity of conditions, relief could have been had under the 3d section.

But when the commission found that the circumstances and conditions were substantially similar, could it then in any case have permitted the carrier to charge a greater sum for the shorter than for the longer haul? Undoubtedly, circumstances might have existed when such permission could have been granted, as for illustration, where a carrier was charging larger single fares for a shorter haul than for fares to a number of persons in a body for a longer haul. If there were not, then the

proviso to section 4 meant absolutely nothing, because as construed by the court the section had no application where the circumstances and conditions were substantially dissimilar, and if no relief could be granted when they were substantially similar, then no circumstances could exist to which the section could be applied. While the construction placed upon the section by this court reduced the power of the commission, when acting thereunder, into a very narrow scope, yet it certainly was not intended to entirely destroy the proviso. If, then, the commission found the conditions at the nearer and more distant points substantially similar, but yet found that the circumstances were such as to warrant a further investigation, by what rule would they proceed to determine whether the relief should be granted? Most certainly by the principles laid down in sections 1 and 3, keeping in mind continually the reasonableness of the charges to both points and whether unjustly discriminatory. This is clearly implied in all the decisions of this court, there not being an intimation therein to the contrary. In fact, the constitutionality of section 4 was, before the amendment of 1910, so far as we are aware, never questioned, but has been repeatedly recognized by this court.

Then what change was wrought by the amendment which renders it unconstitutional?

It was insisted by counsel for the carriers that the phrase "under substantially similar circum-

stances and conditions" constituted a rule of action for the control of the commission, and hence that the constitutionality of section 4, as originally enacted, was thereby saved. But that phrase formed no rule for the guidance of the commission while acting under the proviso of section 4. *It prescribed a condition precedent to the exercise of the power at all.* If the circumstances and conditions were substantially dissimilar, the commission was vested with no power to act; but if they were substantially similar, then the commission could act under the proviso. What, then, was the effect, as bearing upon this question, of eliminating this phrase from the section? In the first place it rendered the requirement that no greater charge be made for a shorter than for a longer haul absolute, unless recourse be had under the proviso to the commission; and in the second place, the act no longer contains a declaration as to when the provisions of this section can not be applied; and hence *the observation of the court in "East Tennessee, Virginia & Georgia Railway Co. v. Interstate Commerce Commission, supra," that the section contains a legislative declaration that lower rates which result from a dissimilarity of conditions can not be unduly preferential or prejudicial has no application to sections 3 and 4, as they now stand.* The circumstances and conditions which create the dissimilarity, instead of constituting a conclusive condition against applying section 4 are, as here-

tofore shown, only evidential facts to be weighed by the commission in determining whether a greater charge for the shorter haul constitutes an undue or unjust prejudice. Instead, therefore, of the amendment doing away with the requirement that in considering whether a carrier shall be relieved from the general rule of the 4th section the commission be guided by the principles of the 1st and 3rd sections, it more clearly implies that the commission shall be so guided.

As heretofore shown, there is no such inconsistency between the first, third, and fourth sections as prevents them from being construed together. The two principles that must be kept in mind by the commission in passing on all questions of rates, regardless of the section under which the inquiry is made, are the reasonableness of the rates and whether they discriminate against any person or locality. The former is broader and includes the latter. No rate that is unjustly discriminatory can, under the statute, be reasonable; but an unreasonable rate is not necessarily unjustly discriminatory. As appears from the decisions of this court, especially *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission, supra,* in determining whether a rate is reasonable, the cost of the service, cost and value of equipment, the existence of competition, the welfare of the carrier and of the localities affected, and every other material fact should be considered; and to decide the question of dis-

crimination requires the consideration of many, if not all, of the same matters. By the amendment of June 18, 1910, all restrictions as to matters to be considered in an inquiry arising under section 4 was removed, and now such an inquiry is as broad in its scope as one under the 3d or even the 1st section. It follows, therefore, that if the 1st and 3d sections of the act are constitutional, the 4th is also valid, and their constitutionality was long ago determined by this court.

For the foregoing reasons it is insisted that the decrees of the Commerce Court should be reversed, the injunctions should be dissolved, and the petitions dismissed.

GEORGE W. WICKERSHAM,
Attorney General.
JAMES A. FOWLER,
Assistant to the Attorney General.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
FEBRUARY, 1912.

○

Nos. 864 & 929.

In the Supreme Court of the United States.

17

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CITY OF SPOKANE, COUNTY OF SPOKANE, CHAMBER OF COMMERCE OF SPOKANE, SPOKANE JOBBERS ASSOCIATION,
Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, OREGON SHORT LINE RAILROAD COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO & NORTHWESTERN RAILWAY COMPANY, CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, CANADIAN PACIFIC RAILWAY COMPANY, MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Appellees.

Office Supreme Court, U. S.
FILED.
FEB 8 1912
JAMES H. McKENNEY,
CLERK.

No. 929.

BRIEF OF APPELLANTS, CITY OF SPOKANE, SPOKANE COUNTY, SPOKANE CHAMBER OF COMMERCE AND SPOKANE JOBBERS' ASSOCIATION.

J. B. CAMPBELL AND H. M. STEPHENS,
Attorneys and Solicitors for Appellants, Spokane, Spokane County, Chamber of Commerce and Spokane Jobbers' Association.

In the Supreme Court of the United States.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CITY OF SPOKANE, COUNTY OF SPOKANE, CHAMBER OF COMMERCE OF SPOKANE, SPOKANE JOBBERS ASSOCIATION,
Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, OREGON SHORT LINE RAILROAD COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO & NORTHWESTERN RAILWAY COMPANY, CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, CANADIAN PACIFIC RAILWAY COMPANY, MINNEAPOLIS, ST PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Appellees.

No._____

BRIEF OF APPELLANTS, CITY OF SPOKANE, SPOKANE COUNTY, SPOKANE CHAMBER OF COMMERCE AND SPOKANE JOBBERS' ASSOCIATION.

STATEMENT OF CASE.

This is an appeal from the United States Commerce Court enjoining and restraining the Interstate Commerce Commission from putting into effect its orders in case No. 879 before the Interstate Commerce Commission, wherein the City of Spokane, County of Spokane, Chamber of Commerce of Spokane and the Spokane Jobbers' Association are complainants and the Northern Pacific Railway Company and others are defendants.

In this action the complainants in case No. 879 before the Interstate Commerce Commission are intervenors.

The proceeding No. 879 before the Interstate Commerce Commission is the first case filed after the so-called Hepburn amendment to the Commerce Act became effective. The complaint in the proceeding in that case was filed about September 1, 1906.

After issues were made up a large amount of evidence was taken and the case was submitted for decision October 1, 1907, and no report or decision was made or rendered until February, 1909.

The complaint before the Commission set

forth that the rates from all eastern shipping points were relatively and intrinsically unreasonable and that shippers at and in Spokane were and are discriminated against by the carriers charging much higher rates to Spokane than to Pacific Coast terminals.

Pacific Coast terminal shippers and traffic organizations intervened before the Commission and sought to prevent the Inland territory securing better or lower rates.

The City of Spokane is situated near the eastern boundary of the State of Washington at an average of about 400 miles from Seattle and Tacoma, in the State of Washington and Portland, in the State of Oregon. Seattle, Tacoma and Portland are situated on water.

The carriers divide the territory from the Missouri River east into zones and fix basing points, such as the Missouri River, Mississippi River, Chicago and common points, Cincinnati, Detroit and common points, Buffalo, Pittsburg and common points, and between these basing points rates are blanketed to Spokane.

Rates to Pacific Coast terminals are blanketed from Missouri River points to the Atlantic Coast. The same rate is charged from St. Paul, Omaha and Kansas City as from New York and

all intermediate points, to Pacific Coast terminals.

Rates to Spokane from any given shipping point are almost invariably higher than rates to Pacific Coast.

Class rates from St. Paul to Spokane are the same as from St. Paul to Seattle, Tacoma and Portland. The same class rate is charged for 1500 miles to Spokane as for 1900 miles to Pacific Coast terminals.

Commodity rates are higher from St. Paul to Spokane than from St. Paul to Pacific Coast termianls. From all points of shipment between the Missouri River and the Atlantic seaboard, commodity rates apply upon almost all freight that moves.

Freight moving to Spokane under commodity rates is much more limited than shipments moving to Pacific Coast terminals. That is, commodity rates are few to Spokane in comparison with those to the coast.

Originally the rates to Spokane were based upon Pacific Coast rates plus the local rate back from Pacific Coast terminals to Spokane. In 1904 this was changed somewhat and intsead of the rate to Spokane being the Pacific Coast

plus the local rate back, the Spokane rate on many commodities was then fixed at the Pacific Coast terminal rate plus an "arbitrary," which "arbitrary," as the name indicates, is added, not because it is the local rate back, but is simply an *arbitrary* amount fixed and added to the Pacific Coast rate.

It was shown and is an undisputed fact in the case that the carriers from St. Paul to the Atlantic seaboard receive the same rate or charge for shipments to Pacific Coast terminals as they do to Spokane. In other words, the carriers from St. Paul, Omaha and west receive the full amount of the excess or difference between the Spokane and the Pacific Coast terminal rates.

To illustrate: If the rate be $1.00 from New York to Seattle, Tacoma and Portland, carriers New York to Chicago receive 25 cents. There is then a deduction made of five cents for alleged terminal charges. This leaves 70 cents of the $1.00 rate. Of this 70 cents the roads from Chicago to St. Paul receive 15 per cent or 10½ cents, making a total of 35½ cents (exclusive of the Chicago terminal charges), up to St. Paul, or one-half the distance from New York to Spokane. From St. Paul to Spokane, 1500 miles, based upon the coast rates, carriers re-

ceive 59½ cents as against 35½ cents from New York to St. Paul. Excluding terminal charge at Chicago, from New York to St. Paul the carriers receive but little more than one-half as much for the first 1500 miles as the western carriers receive for the second 1500 miles. This, it must be remembered, is based upon the coast rate.

If the rate from New York to Seattle is $1.00 and the rate to Spokane $1.50, the carriers to Chicago get 25 cents. The terminal charge of five cents is deducted. Carriers from Chicago to St. Paul receive 10½ cents. The carriers from St. Paul to Spokane receive $1.095 for a haul 400 miles less than to Pacific coast terminals. The carriers from New York to St. Paul receive 35.5 cents for 1500 miles and the carriers from St. Paul to Spokane receive $1.095 for 1500 miles. This is 50 cents more than they would receive on same shipment to coast, 400 miles farther.

The commission held in the first opinion or report:

> "It will be seen, therefore, that Spokane rests, owing to the structure of its tariffs, under two disabilities. It must, in the first place, pay a higher rate upon practically everything which reaches that locality from the Missouri River or east, and it is restrict-

> ed, in the second place, in the markets in which it can buy, for while Seattle and other coast cities can purchase in all territory east of the Missouri River upon even terms, this is by no means true of Spokane."

The defense of the carriers was that water competition exists and creates different or dissimilar circumstances and conditions, and for that reason they are entitled to charge a higher rate for the longer distance.

The Commission found that water competition does exist between the Buffalo-Pittsburg line and Atlantic seaboard to Pacific Coast terminals.

The Commission in its first opinion, among other things, determined:

> "It is not meant that rail carriers might not at the present time maintain temporarily higher rates than are now in effect to Pacific coast terminals. They probably could, certainly on many articles. In 1904 most transcontinental rates were advanced 10 per cent, and that advance was followed by corresponding advances in water rates. * * *
>
> "When once the fact of this competition and its effect upon these rates have been found, the decisions of the Supreme Court of the United States foreclose our conclusion. * * *
>
> "These water rates to Pacific coast terminals apply only from New York. * * *

"The case further shows that as a practical matter traffic only moves in very small quantities by this water route from farther west than the Buffalo-Pittsburg line. But the rates to Spokane, as we have already seen, are higher than to Portland from all territory east of the Missouri River. Assuming now that under the decisions of the Supreme Court these defendants may properly name a lower rate from New York to Seattle than to Spokane, or possibly that they may properly do the same thing from Buffalo or from Pittsburg, upon what possible theory can they apply those rates from an interior point from which traffic never moves by water and could not so move owing to the high local rate from the interior point to New York. * * *

"It is suggested that the Commission possesses today, under the amended law, a more extensive authority than it formerly had and that for this reason we should declare this discrimination against Spokane in favor of the coast towns to be unlawful. The amendments of June 29, 1906, which conferred these enlarged powers did not in any respect change the third and fourth sections. The interpretation which had been put upon those sections by the court was well known to Congress, and the alleged discriminations and hardships resulting from that interpretation were called forcibly to the attention of the committees having that legislation in charge. That Congress did not, in making the extensive revision of the act which was effected by these amendments, see fit to alter the third and fourth sections in this particular, is highly persuasive that it was the intention of that body

> to leave the law and its practical working, as applied to the case before us, exactly as it had been."

In 1892, Mr. James J. Hill, President of the Great Northern Railway Company, solemnly promised and agreed that in consideration of the citizens of Spokane giving him a free right of way through the city that he would grant them terminal and relative rates, and by relative rates are meant better than terminal rates from eastern and middle west interior points.

The Commission did not state this agreement as strongly as the facts warrant, the language of the Commission is as follows:

> "Certain rights of way through the city of Spokane were needed by the Great Northern Railway in the course of its construction from the east to the coast, and that company applied to the citizens of Spokane for a donation of the necessary land. The president of that company held several meetings with the citizens and with various committees on this subject, during which he either expressly said or left a very strong impression that if this right of way was granted the Great Northern Railway would apply terminal rates at Spokane. At about the time that railroad was opened for operation to Spokane a certain tariff was printed but apparently never put into effect, which named rates to Spokane not quite as low as those to Seattle, but very much lower than any which were ever actually applied. The alleged failure of Mr. Hill to keep his

> promises and the inability of Spokane to procure in any way what jobbers conceived to be fair rates, finally led in 1904 to the organization of a boycott by the jobbers of Spokane against the Great Northern and Northern Pacific lines. These shippers by concerted action diverted their entire shipments to the Union Pacific line, of which the Oregon Railway & Navigation Company is the delivering carrier. The result was a conference between the railways and the jobbing interests of Spokane at which coast jobbers were also represented, the outcome being an understanding that Spokane was to be accorded a certain defined territory."

The complainants insisted and showed by evidence that the original cost of construction of the Great Northern Railway Company was $27,000 a mile. The Great Northern Railway Company was the most cheaply constructed transcontinental road from St. Paul to Spokane and the complainants desired rates fixed on the basis primarily of cost of service. The Great Northern Railway Company has the least curves and the best grade and can operate more economically than the other transcontinental roads then existing. The Commission refused to fix rates upon that basis, but fixed them upon consideration of all the northern transcontinental lines. The Commission held that the Great Northern Railway could be reproduced for about $52,500 per mile. This would be almost

double what it originally cost. The original cost of construction included a large amount of watered stock and stock given as gratuity or stock dividends. The Commission also found that by speculating with earnings in ore lands around Duluth, Minnesota, that ore certificates were furnished the stockholders which were worth about par value of the stock of the Great Northern Railway Company.

The Commission found with reference to the books and accounts:

> "It would be difficult to devise a scheme better intended to confuse and to conceal than that employed in the development and operation of the Great Northern Railway System."

Notwithstanding these difficulties, however, the Commisison found that the Great Northern Railway Company has always paid dividends at the rate of 7 per cent per annum and had at the time the first opinion was written, in round numbers, $33,500,000 surplus, and besides had made from earnings large expenditures for permanent improvements and betterments.

The Commission found that the Northern Pacific could be reproduced at the cost of $56,000 per mile.

It appeared and the Commission found that

the Northern Pacific is paying and has been paying 7 per cent on its stock for a number of years. That it has expended in permanent improvements about $23,000,000, and had in 1907 about $32,000,000 surplus.

Since the first hearing it appears in the record that the Northern Pacific Railway has increased its capital stock $90,000,000 and the Great Northern Railway Company $60,000,000, upon which they are paying and have been paying 7 per cent dividends.

The Commission found that the surplus accumulated by the Great Northern over and above permanent improvements and paying of dividends, is in round numbers $61,000,000, and that it has earned for a number of years ten to fifteen per cent on its capital stock. The Commission (relative to these two companies) made the following observations:

> "It is impossible to avoid the conviction that both these companies—and there is very little difference between the two in this respect—have enjoyed for the last half dozen years previous to June 30, 1907, excessive earnings.
>
> "In saying this we have in mind the fact that those years were years of unusual prosperity, but it must also be remembered that the development of the country served by these systems and the financial strength of

the systems themselves put them beyond the possibility of a recurrence of the conditions of 1893. Nothing more conclusively shows this than the actual results of the year 1908. * * *

"In order to understand the effect upon the revenues of these defendants of any order which might be made, we required them to furnish us a statement showing the loss of income which would be worked by applying terminal rates to the business which actually moved to Spokane for the year 1906. Since it was a work of much labor to determine these figures for an entire year, two months were selected which were said to be fairly representative, and it was assumed that the showing made in these months would indicate correctly the whole year. From these figures which have been worked out by taking actual shipments to Spokane and applying terminal rates it would appear that during the year 1906 the Great Northern would have lost in its revenues at Spokane $340,484, and that the Northern Pacific, during the same time, by the application of terminal rates, would have lost $477,139."

"The rates attacked are made in pursuance of a well-defined scheme of rate making. All other intermediate territory pays higher rates in common with Spokane. Whatever rule is applied here must be applied elsewhere, and in deciding this question we must consider the effect upon the revenues of these defendants of applying terminal rates not only at Spokane but at all other intermediate territory. The defendants were therefore required to furnish, in addition to the above-mentioned computa-

> tion as to Spokane, a further computation showing reductions in revenue if terminal rates had been applied to all business both east and west of Spokane. These figures show that the entire loss to the Great Northern would have been $645,000, while the entire loss to the Northern Pacific would have been about $1,197,000."

The Commission held and determined that they could not fix rates upon commodities that were not specifically mentioned in the complaint. Under that holding it became necessary to file a supplemental complaint involving specifically the entire commodity tariff, which was done. The second decision was rendered June 7, 1910.

The class rates fixed by the decision February, 1909, fixed a lesser class rate from Chicago to Spokane than from Chicago to the Pacific coast terminals. These class rates were further reduced by the decision June 7, 1910. By that decision the rates were tentatively fixed upon the commodities.

The Commission by its decision in February, 1909, granted leave to the carriers to propose a plan or scheme to adjust rates in accordance with report of the Commission. A scheme was proposed which left the rates higher than the Commission ordered put in. With reference to

this scheme of the carriers the Commission in the second decision said:

> "To determine whether the scheme of the defendants shall be approved we must first understand clearly what that scheme is.
>
> "It was claimed by the defendants and found in the original decision that rates from eastern points of origin to Pacific coast terminals were induced by water competition. It appeared, however, from the testimony and was stated in the opinion, that while these terminal rates are influenced by, they did not fully meet, this competition by sea, since large quantities of traffic still move to all Pacific coast terminals by the various water and rail-and-water routes from the Atlantic seaboard. The defendants, in constructing their plan, started out with the assumption that rates 25 per cent lower than the present rates would be required to fully meet this sea competition.
>
> "Traffic from the Atlantic seaboard to an interior destination, like Spokane, may move by water to a Pacific coast terminal, like Seattle, and from that terminal by rail, the through rate being the sum of the water rate to Seattle and the rail rate from Seattle. A rate from the eastern point of origin to Spokane, which fully met water competition at Spokane, would be constructed, therefore, by taking the water competitive rate to the terminal and adding to it the full local from the terminal to the interior point. * * *
>
> "While it is of great importance to Spokane as a commercial center that it shall control the wholesaling business into surrounding territory, and while there is great force in its claim that no schedule of rates

can be right which permits merchandise to be hauled from the east over the Cascade Mountains to Seattle and back again to the consumer upon the east of that mountain range, and while the complainants are justified in urging upon the Commission the discrimination which may arise against the wholesaler in that locality still the right of Spokane to control this territory should depend upon a reasonable adjustment of rates which is open to Spokane and to all corresponding territory, and not upon a special arrangement peculiar to that locality. We may and should inquire to what extent the Spokane wholesaler can compete in adjacent territory with his rival upon the Pacific coast, but we should not disapprove this schedule simply because it is less favorable to the wholesaler at Spokane in some respects than the present rates."

"The scheme of the defendants assumes that water competition exists at Spokane which must be met. The testimony in this record fails to disclose the existence of such competition to any appreciable extent. While a reduction in the rates from the coast to Spokane would tend to stimplate the movement of traffic through Seattle and Tacoma, still it does not appear probable that such a movement could ever assume considerable proportions, even with the present westbound rates to Spokane.

"This scheme of the defendants therefore is founded upon facts which do not exist, is constructed upon a theory which can not be approved, and is of no assistance in solving the general problem before the Commission. While we recognize that these defendants have made an honest effort to meet the

situation, by the construction of these schedules, we are constrained to withhold our approval."

In the second decision the Commission, as in the first decision, held that it could not consider the coast rates, or measure Spokane by coast rates, nor fix reasonable rates by comparison. The language of the Commission is as follows:

"Both parties are highly dissatisfied with the few commodity rates which were fixed by the Commission. The complainants renew, with great earnestness, their claim that no rate should be permitted at Spokane which exceeds the rate to Seattle. We have, however, upon full consideration, held that, under the decisions of the Supreme Court of the United States, the Seattle rate can not be made the measure of the Spokane rate; that our only power is to establish rates to Spokane which are just and reasonable under all the circumstances, and to this ruling we must adhere."

"The defendants urge that our decision, carried to its legitimate conclusion upon the whole commodity list, in view of reductions which must elsewhere result, will be disastrous. They further show that since the submission of the original case large expenditures have been made upon their properties, which, of itself, might well call for a reconsideration of the conclusions reached upon the record as it then stood.

"In the former hearing the Northern Pacific and the Great Northern companies attempted to show the cost of reproducing their respective properties. This testimony

was given as of the spring of 1907. The Northern Pacific now shows that since then it has expended approximately $93,000,000, while the Great Northern shows an expenditure of approximately $75,000,000. These sums would in each case equal approximately 25 per cent of the entire cost of reproduction as found by the Commission, and would, if not accompanied by increased earnings, perhaps justify the claim to a greater return.

"An examination of the nature of these expenditures does not, however, lead to the conclusion that they can have any legitimate bearing upon the correctness of our former decision. While some small part of the outlay is upon the property, the cost of reproducing which was given in the former case, the great bulk of the expenditure is not. * * *

"The Northern Pacific and Great Northern have each advanced in the construction of the Spokane, Portland & Seattle railroad some $25,000,000, which is a part of the total expenditure above named. * * *

"The defendants assumed in the argument of this case at Spokane and again in the argument of the Reno and Salt Lake cases, 19 I. C. C. Rep., 218 and 238, that the Commission had reduced the rates to Spokane because it found that the revenues of the carriers were excessive and for the purpose of reducing those revenues. This is an entire misconception both of the purpose and of the effect of our inquiry into the financial operations of these companies. * * *

"On a carload of drugs shipped from New York to Spokane, carriers from New

York to Chicago, 900 miles, received $139.53; from Chicago to St. Paul, 400 miles, $59.69; and from St. Paul to Spokane, 1,500 miles, $543.48; a total of $742.70. Had this carload been moved through Spokane and over the Cascade Mountains to Seattle, 375 miles farther, the total charges would have been $556.12, and the receipts of the defendants for the haul of 1,875 miles from St. Paul to Seattle, $356.90.

"On a carload of glassware from Pittsburg to Spokane the receipts were, from Pittsburg to Chicago, 500 miles, $70.85; from Chicago to St. Paul, $45.92; from St. Paul to Spokane, $532.67; total, $649.44. Had the shipment moved to Seattle the total charges would have been $393.60, of which the lines from St. Paul would have received $276.83.

"On a carload of tinware from Chicago to Spokane, lines up to St. Paul received $55.69; from St. Paul, $542.61; total $598.30. Had the shipment moved to Seattle the total charges would have been $376.04, and the division of the lines west of St. Paul $320.35."

"A carload of books from Chicago yielded to carriers from Chicago to St. Paul $84.85; from St. Paul to Spokane $855.65; total, $940.50; while the same shipment to the coast would have totaled $585.20, yielding to the carriers west of St. Paul $500.35. * * *

"The defendants undertook to justify this condition of things upon the plea that their coast rates were controlled by water competition; that their Spokane rates were reasonable, and that any reduction at Spo-

kane would deprive them of a fair return upon the value of their property.

"The attack of the complainants was not upon a single rate nor upon a comparatively small number of rates, but upon the entire schedule from the east to Spokane. Conditions at Spokane were like those at numerous other points, and whatever rule was applied there must be extended to these other points. All this meant that any considerable reduction of the rates to Spokane must produce a very material effect upon the revenues of the defendants. The defendants earnestly urged that such reduction would deprive them of their property, in violation of the constitution of the United States.

"This issue was made by the defendants; it was a fundamental issue and must be first determined. Before these rates, involving as they do whole schedules, can be reduced, we must decide whether the result will be to deprive the defendants of a fair return upon their property. A considerable part of the discussion necessarily centered around this issue, which was, in that sense, a controlling one. But the purpose of that discussion was not to ascertain whether rates should be reduced but whether they could be reduced.

"The Commission held that the earnings of the Northern Pacific and the Great Northern for the ten years preceding 1908 might fairly be termed excessive and that reductions in revenues might therefore be made without violating the constitutional rights of those companies. Having determined that question, we did not make reductions in rates to Spokane for the rea-

son that these revenues were excessive and for the purpose of reducing those revenues. * * *

"The Northern Pacific Company already has either a double track or a double line a considerable portion of the distance between St. Paul and the Pacific coast, and within a comparatively few years the entire system will be provided with a double track or its equivalent. In some respects this railroad has cost more and in some respects less than a similar railroad east of the Missouri River. The cost of operation is somewhat more, and in our opinion the corresponding freight rates may properly be somewhat higher in this territory than east of the Missouri River, but we were unable to see, when our first opinion in this case was promulgated, and we are unable to see now, any excuse for these abnormally high rates between St. Paul and Spokane. What is said of the Northern Pacific applies to the Union Pacific lines leading west from the Missouri River, and to the Great Northern, although the amount of business handled by the latter line is somewhat less than that of the other two.

"We have patiently listened to both the complainants and the defendants, and have endeavored to carefully and fairly consider this whole situation. * * *

"In fixing these rates we have proceeded upon the view that, under the present decisions of the Supreme Court of the United States, we could not use the rate to Seattle as a standard by which to measure that to Spokane. If this were otherwise, if we were free to take into account all the competitive conditions existing both east and

> west and to determine what, in the light of all these conditions, would be a just and reasonable relation between the rates of Seattle and Spokane, a somewhat different question would be presented."

In the third and last report in the Spokane case the Commission disposed of the applications of the carriers for relief from the long and short haul clause. Among other things the Commission found:

> "The Commission felt that, in view of the whole situation, rates to Spokane from eastern territory ought in justice to depend to an extent, at least, upon those which the carriers made to the coast cities and it considered the advisability of attempting to dispose of the case upon that theory, but in view of the doubt as to its right to do so, it adopted the plan of prescribing a schedule of rates to Spokane without reference to the coast.
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> "In the opinion of June 7, 1910, 19 I. C. C. Rep. 162, at page 174, the Commission said:
>
> > "'In fixing these rates we have proceeded upon the view that, under the present decisions of the Supreme Court of the United States, we could not use the rate to Seattle as a standard by which to measure that to Spokane. If this were otherwise, if we were free to take into account all the competitive conditions existing both east and west and to determine what, in the light of all these conditions, would be a just and reasonable

relation between the rates of Seattle and Spokane, a somewhat different question would be presented.'

"'On June 18, 1910, subsequent to the promulgation of the foregoing opinion, the fourth section was amended. The city of Spokane claims that the amended section now in express terms forbids the discrimination against which that locality has always protested. It seems proper to inquire, therefore, whether, under that section in its present form, this discrimination is forbidden or can, if found to exist, be corrected by an order of this commission. In this view we caused the applications of carriers for leave to depart from the rule of the fourth section in the making of these transcontinental tariffs to be assigned for hearing and argument at the same time with these and cognate cases. The questions presented under those applications have been elaborately discussed; additional testimony has been heard, and the whole matter is now before us for disposition. In disposing of it we have to inquire:

"1. What is the duty and authority of the Commission under the present fourth section?

2. Can the Commission under that section make an order in one or both of these cases which will obviate the necessity of prescribing a schedule of reasonable rates?"

* * * * * *

"This decision of the Supreme Court fully confirmed the interpretation which this Commission had placed upon the *Alabama Midland case*. If circumstances

and conditions at the more distant point were dissimilar, carriers might without restraint depart from the long-and-short-haul rule. This virtually repealed that section, for the reason that it is always possible to show in the interlacing network of railways in this country, and in view of the intricate commercial conditions, that circumstances are different at one point from another. To hold that carriers may, wherever the dissimilarity exists, meet that competition or decline to meet it, partially meet it here and fully meet it there, is to hold that they may without practical restraint discriminate between different localities.

"The Commission was forced to and did dismiss complaint after complaint upon the ground that there was a substantial dissimilarity of conditions at the more distant point, without inquiring whether, in point of fact, under the circumstances, the discrimination against the intermediate point should have been permitted. That provision of the section authorizing the Commission to prescribe the instances in which carriers might depart from the rule of the section and the extent of that departure could be given no practical effect.

"The history of the judicial interpretation of this section has been given with tedious and apparently unnecessary detail, in order that the effect of the words "similar circumstances and conditions" upon the actual application of the statute might be clearly apprehended. The fourth section was for practical purposes a nullity. For 20 years this Commission has made no order of consequence under that section which could be enforced, and this because

of the existence of these words. Their presence has rendered futile the prohibition of the section and has made it impossible to give any effect to the proviso which allowed the Commission to designate the instances in which the rule of the prohibition might be departed from."

* * * * * *

"The real difficulty before had not been that the existing relation of rates must be attacked by complaint. Many complainants were ready and anxious to initiate such proceedings, and many complainants did initiate such proceedings only to be told that the Commission had no authority to grant relief, even though it were of the opinion that such relief should be granted. It was the manifest intent of Congress not only to provide by the amendment of this section that carriers must become the advancing party in justifying this particular species of discrimination, but also to give to the Commission some effective power to deal with the case when presented. Had the only purpose of Congress been to shift the burden of proof it would have said so, as it did with respect to certain other rate conditions. If the only function of the Commission is to inquire whether competition exists at the more distant point the matter stands, for all practical purposes exactly where it has stood from the first. Congress certainly meant to go further than this. It meant not merely to declare a wrong, but to provide a remedy."

* * * * * *

"When it became evident that the section as originally enacted was of little or no force in that form and the proposition

to amend the section into some effective shape was before Congress, the same difference of view again developed. Some were for an absolute long-and-short-haul section, while others, and apparently the great majority were satisfied that there were cases where carriers should in justice be permitted to make the higher charge at the intermediate point. The problem was to locate these cases. For that purpose it was provided that in every instance where the carrier desired to deviate from the rule of the section it should apply to the Commission, which should investigate and pass upon the propriety of the lower charge at the more distant point; but Congress did not intend to leave this to the mere whim of the Commission any more than it intended to permit arbitrary action where the question is upon the reasonableness of the rate or the undueness of a preference. This is clearly stated by Mr. Mann, chairman of the committee having the bill in charge in the House, who said in explaining the meaning of this section upon the floor:

> "'Remember, whatever theCommission does in respect to this matter, it is always bound by the act of Congress that rates shall be just and reasonable and that railroad companies shall not establish unjust and unreasonable rates, so that practically what we do here is to give the Commission power to say what in a particular case shall be a just and reasonable rate, although we declare as a general proposition that it shall be unjust and unreasonable to charge more for a short haul than for a long haul.'"
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> * * * * * *

"Strictly speaking there is no such thing as market competition which is distinct from competition between the lines of transportation serving the market. A market can only compete through the agency which transports for it. The carrier makes a rate from a given market, not out of favor to that locality, but because it desires to obtain traffic which will not otherwise come to it. There would seem, therefore, to be little distinction between the competition of markets and the competition of rival railroads. The whole situation must be considered by us in passing upon these applications.

* * * * * *

"Spokane is located about 400 miles east of the Pacific ocean, in the midst of a region rich in agricultural and mineral resources. Between it and the coast lies the Cascade range of mountains. Spokane is the principal city in Washington east of these mountains and aims to distribute to the territory which surrounds it, in which attempt it meets severe competition from Seattle, Tacoma and Portland.

"Two of the trunk lines of railway serving Spokane both from the east and the west are the Northern Pacific and the Great Northern, the principal defendants in the *Spokane case*. Traffic handled by these carriers from eastern points of origin to Pacific coast cities passes through Spokane and over the Cascade range. Notwithstanding this, rates to Seattle, Tacoma and Portland from points as far west as St. Paul and the Missouri river are, for the most part, materially higher to Spokane than to coast towns. Merchandise consumed in ter-

ritory east of the mountains can be hauled through the city of Spokane, across the mountains, to Seattle, and from Seattle back over the mountains a second time, at a less transportation charge than it can be taken to Spokane and thence distributed to this territory. It is against this relation of rates that Spokane has always protested and now protests. Its complaint is, first of all, against this violation of the fourth section."

* * * * * *

"The carriers have met this competitive situation by establishing from the Atlantic seaboard to Pacific coast ports a series of commodity rates. Their class rates may be disregarded, since no traffic actually moves under them, the business being handled under some 1,300 commodity items, said to be so adjusted as to best meet this water competitive situation.

"These rates to Pacific coast terminals are made applicable not only from the Atlantic seaboard where water competition exists, but from territory as far west as the Missouri river and even Colorado; that is, the same rate to Pacific coast terminals is made from Colorado common points and all territory east, thus creating a blanket some 2,000 miles in width.

"Upon the west there is no blanketed territory. Rates to interior points are usually constructed by adding the local rate from the terminal to the interior. This is not so in all cases. It was said, for example, that rates from the east to Spokane were higher than the coast rate by about 75 per cent of the local back. In all cases, however, the rate from all this blanketed territory to the interior point is very much

higher than to the more distant coast point.

"Now, assuming that there is actual water competition which these defendants may meet, is there anything in this scheme of transcontinental rate making of which Spokane can legitimately complain? The question is not whether rates from the Missouri river or from other eastern points of origin to Spokane are excessive. That question has been considered and passed upon by the Commission. We are now inquiring whether the system upon which these rates are constructed is unlawful, and whether any substantial relief should be or can be given by an order under the fourth section."

* * * * * *

"The next contention of the complainants is that even though there be water competition between the Atlantic seaboard and the Pacific coast and even though the force of that competition does dictate the rate between those points, nevertheless there is no such competition from the interior, as, for example, from Chicago, and that therefore while the defendants may properly charge a higher rate from New York to Spokane than the corresponding rate to Seattle, they can not properly maintain this discrimination when the point of origin is Chicago.

"In this discussion New York, which is the principal port of departure upon the Atlantic seaboard, and San Francisco, which is the largest and most important port upon the Pacific coast, may be treated as synonymous with the coast territory itself. It is evident that traffic in New York can move the entire distance to San

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Francisco by water, and that therefore water competition may and does control the rate between those points. If, now, traffic is at some interior point, like Chicago, it can only take this water route by being carried from the interior point to New York by rail. Total cost of the carriage from the interior point to San Francisco would be made up of the cost to New York and that from New York. It would follow that as the distance from the Atlantic coast increases the cost of carriage by water also increases and the direct effect of water competition decreases. If, therefore, rates were so adjusted as to simply meet and fully meet water competition the rail rate from New York to San Francisco would be lower than that from Chicago by the amount of the rate from Chicago to New York.

"If, for example, the water rate on a given article from New York to San Francisco is 50 cents, and this forces a rail rate between those points of 60 cents, and if the rail rate from Chicago to New York is 25 cents, then the rate from Chicago to San Francisco would be 85 cents. Spokane contends that since the rate from Chicago is the same and sometimes even lower than from New York it must follow that it is due to some other cause than water competition."

* * * * * *

"The testimony in this and other cases indicates that the principal movement by water is from the Atlantic seaboard itself, from New York and from points having water communication with New York and from interior territory immediately contigu-

ous. There is a considerable movement as far inland as Buffalo and Pittsburg, and an occasional movement from Detroit, Chicago and similar points. A movement of starch from Cedar Rapids, Ia., of considerable proportions was shown, but, generally speaking, up to the present time comparatively little traffic originating west of the Buffalo-Pittsburg zone has reached the Pacific coast by water.

"In this connection it should be observed that in the past water competition has been by various devices upon the part of rail carriers restrained and subdued.

"At the outset the special contract system was devised, under which large rebates from the going rate were paid to those shippers who exclusively patronized the rail lines. By this scheme the ships were soon robbed of the bulk of their traffic.

"When this expedient would no longer be tolerated transcontinental railroads subsidized the Panama line, which had become the active water competitor, by purchasing a considerable part of the total available space in the boats of that line from New York, and thus controlling the rates by that route. This was continued for years.

"Since the advent of the American-Hawaiian line there has been, not perhaps a definite agreement between it and the rail lines, but a general understanding that such rates should be maintained by water as compared with rates by rail as would give to the vessels a reasonable amount of traffic from the immediate vicinity of New York.

"Of more importance than all the rest have been the extrtmely harmonious rela-

tions generally existing between shippers and rail carriers upon the Pacific coast. Those shippers most interested in transcontinental rates have been the jobbers of San Francisco and other coast-terminal cities. The only desire of those shippers has been that rates should be so adjusted as would enable them to transact business against interior cities. So long as this relation of rates has existed the jobber has been willing to pay both a high rate to San Francisco and a high rate from San Francisco. In consideration that this relation should be maintained the shipper upon the coast has found it for his interest to patronize largely the rail carrier without inquiring too closely what rates were by water.

* * * * * *

"The middle west today manufactures nearly everything which is produced upon the Atlantic seaboard, and the effect of this policy of the railroads has been to make the middle west the almost exclusive market of origin for the inter-mountain country and largely for the Pacific coast itself. This competition is strictly that of carriers, although sometimes termed "market" competition."

* * * * * *

"The third claim of the complainants is that while the defendants recognize upon the Atlantic seaboard the force of competition in its various forms, hereinbefore stated, they decline to do so upon the Pacific coast. While they extend the New York rate to Chicago and the Missouri River they decline to extend the Seattle rate to Spokane although every reason which justifies that in the former case re-

quires it in the latter. Just as traffic can be and occasionally is carried by rail from Chicago to New York and thence by water to San Francisco, so is traffic at times and indeed much more frequently handled from New York to Seattle by water and from Seattle to Spokane by rail. If the application of the transcontinental rate from Chicago is necessary to prevent the movement by water from Chicago through New York, all the more is the application of that rate from New York to Spokane necessary to prevent the movement of traffic from New York to Seattle and from Seattle to Spokane.

"Spokane is a great distributing center and aims to be a greater one. It demands the right to rates which will enable it to bring from the east and distribute into territory lying east of the Cascade Range. Such traffic, when distributed from Spokane, is hauled a less distance by 400 miles than when distributed from Seattle, and the distribution haul itself is also much less expensive. It is manifest economic waste to haul traffic over the Cascade Mountains and back again.

"The interest of the carrier and the public as much require that this business should stop at Spokane instead of going on to Seattle as that it should originate in the middle west instead of upon the Atlantic seaboard.

"Spokane insists that if these defendants give to Seattle the right to buy in both New York and Chicago, when its location entitles it to buy in New York alone, they should give to Spokane, which is nearer by 400 miles, the right to buy in both New

York and Chicago. New York urges that if Chicago is given the opportunity to sell Seattle then New York shall be given the opportunity to sell in Spokane. In other words the same blanket rate which is applied on the east should be applied upon the west.

"The carriers insist that they may determine as a matter of policy whether they will meet this water competition, and in what manner and at what points; and this is true so far as that is a matter of policy. To a disinterested observer it would seem to be in the true interest of these transcontinental lines, which begin at the Missouri river, to make rates which would build up interior points as against the coast. The haul to these points is shorter and less expensive. The distribution from these points is easier, but, above all, the traffic which is created at such a point belongs to the rail line which creates it, while the traffic which is fostered upon the coast is the prey of every vessel which sails the sea. Carriers in the future will doubtless adopt this method and will voluntarily make rates to interior points like Spokane which will enable those localities to compete with coast cities.

"Admitting, however, that it is for these defendants to say to what extent, if at all, they will meet these competitive conditions, they are not at liberty, in meeting them, to adopt such a policy, nor to execute the policy adopted in such a manner as to unjustly discriminate between different localities.

"They may perhaps determine whether they will apply the coast rate, which is

fixed by water competition, at the interior point, but if they apply it at one point they must apply it at others which are similarly situated; they cannot, in the absence of some sufficient reason, give Chicago that rate and refuse it to St. Louis and Kansas City. They can not so adjust their whole tariff scheme, upon the plea of water competition, as to concentrate in these coast cities commercial and transportation advantages to which their mere location does not entitle them, and that in substance is the effect of the present rate adjustment."

The Commission had before it tables showing actual earnings on shipments to Spokane as compared to what would have been earned to Pacific coast terminals, as follows:

DRUGS

Commodity	New York to Chicago	Pittsburg, Cleveland, Detroit to Chicago	Chicago to St. Paul	St. Paul to Spokane	Total	Same shipped to Coast would earn.	Amount the roads would earn from St. Paul to Coast on Coast Shipments.
Drugs	108.25	....	46.47	422.60	577.32	432.99	278.27
Drugs	96.07	....	41.25	375.04	512.36	384.27	246.95
Drugs	139.53	....	59.69	543.48	742.70	566.12	356.90
Soda Caustic.	69.30	....	69.30	418.50	557.10	323.40	184.80

DRY GOODS

List of Commodities	New York to Chicago	Pittsburg and Buffalo to Chicago	Chicago to St. Paul	St. Paul to Spokane	Total	Same shipments to Coast would earn.	Amount that roads would earn from St.Paul to Coast on Coast shipment
Calico	86.07	...	36.30	487.98	610.35	344.30	221.93
Cot. P. Goods	96.05	...	40.51	544.50	681.06	384.18	247.52
Cot. P. Goods	104.96	...	44.28	595.08	744.32	419.87	270.63
Cot. P. Goods	106.88	...	45.09	606.00	757.97	427.57	275.60
Cot. Knit Underwear & Hosiery	99.00	...	38.64	394.89	523.53	327.30	198.66
Table Oil Cloth	86.92	...	36.66	440.60	564.18	347.68	224.10

CHINA, CROCKERY, ETC.

Commodity	New York-Boston to Chicago	Pittsburg-Buffalo-Detroit to Chicago	Chicago to St. Paul	St. Paul to Spokane	Total	Same shipped to Coast would earn.	Amount that roads would earn from St.Paul to Coast on Coast Shipments
Chimneys, Lamp	....	35.26	35.75	275.41	346.42	246.00	174.99
Earthenware	....	65.85	54.48	578.83	699.16	454.00	333.67
Earthenware	....	67.86	40.71	472.01	580.58	358.15	249.58
Enameled Ware	69.15	....	29.75	341.71	440.61	276.60	177.70
Glassware	....	35.57	28.65	424.84	489.06	296.40	232.18
Glassware	....	70.85	45.92	532.67	649.44	393.60	276.83
Glassware	....	60.08	48.06	552.78	660.92	400.56	292.42
Refrigerators	65.23	....	27.79	318.06	411.08	260.55	167.53
Stoves	....	....	49.44	510.88	560.32	428.48	379.04
Enameled Ware	....	39.60	32.12	350.68	422.40	264.00	192.28

HARDWARE

Commodity	New York and Boston to Chicago	Pittsburg-Cleveland-Detroit to Chicago	Chicago to St.Paul	St. Paul to Spokane	Total	Same shipped to Coast would earn.	Amount that roads would earn from St.Paul to Coast on Coast Shipments.
Clevises	....	....	34.57	357.11	391.68	244.80	210.23
Locks, Iron	144.48	....	41.87	507.67	664.02	408.87	252.52
Paper, Rfg	61.48	....	25.18	335.17	421.83	245.25	158.59
Refrigerators	....	30.90	33.67	354.93	419.44	266.11	201.54
Shoes, Horse	94.25	....	38.94	455.35	588.54	376.13	242.94
Tin Ware	....	....	55.69	542.61	598.30	376.04	320.35
Wood, Wagon	....	....	41.76	508.08	549.84	295.80	254.04

BOOKS, ETC.

Commodities	New York and Boston to Chicago	Pittsburg-Buffalo-Detroit to Chicago	Chicago to St.Paul	St. Paul to Spokane	Total	Same shipments to Coast would earn.	Amount the roads would earn from St.Paul to Coast on Coast Shipments.
Books, Blank	176.71	....	51.29	500.39	728.39	495.65	267.65
Books, N. O. S.	....	....	84.85	855.65	940.50	585.20	500.35
Castings, School Desk	....	63.70	70.16	618.54	752.40	530.84	396.98
Furniture School	....	55.22	58.05	527.58	640.85	460.02	345.75
Ink, Paste, etc.	....	....	75.55	880.67	956.22	528.30	452.75
Envelopes, Paper, Cardboard and Carbon Paper	97.00	....	53.27	581.34	731.61	427.01	276.74
Paper Plates	84.40	....	31.68	398.25	514.33	297.60	171.52
Paper Tablets	112.78	....	42.60	518.35	673.73	423.69	268.31
Paper Tablets	83.13	....	34.49	410.68	528.30	332.24	214.62
Paper Tablets	69.29	....	28.74	342.25	440.28	276.88	178.85
Toys	....	....	47.58	519.38	566.96	327.39	279.81
Toys	71.37	....	29.40	357.44	458.21	274.00	173.23

LIQUORS

Commodity	New York to Chicago	Pittsburg-Buffalo to Chicago	Chicago to St.Paul	St. Paul to Spokane	Total	Same shipments to Coast would earn.	Amount the roads would earn from St.Paul to Coast on Coast Shipments..
Whisky in Glass..	140.16	....	58.24	553.60	752.00	480.00	281.60
Whisky in Wood...	....	....	43.56	392.04	435.60	302.50	258.94
Whisky in Wood...	105.78	....	L&R	654.49	760.27	492.50	286.72
Whisky in Wood...	....	....	64.07	583.67	647.74	441.25	374.18

PAINTS, ETC.

Commodity	New York to Chicago	Pittsburg-Cleveland-Detroit to Chicago	Chicago to St.Paul	St. Paul to Spokane	Total	Same shipments to Coast would earn.	Amount the roads would earn from St.Paul to Coast on Coast Shipments..
Cans, Tin	...	20.40	20.80	287.84	329.04	170.00	129.00
Glass, Plate ..	...	151.26	123.69	1338.42	1613.37	1008.36	733.41
Glass, Rough Rolled	...	....	85.32	663.60	748.92	592.50	507.18
Glass, Window	...	55.61	44.07	538.83	638.50	370.75	271.07
Glass, Window	...	102.12	L&R	490.17	592.29	374.44	272.32
Glass, Window	...	110.92	L&R	499.63	610.55	385.98	272.06
Glass, Window	...	176.16	73.59	830.73	1080.48	704.66	454.91

IRON, ETC.

Commodity	New York and Boston to Chicago	Pittsburg to Chicago	Chicago to St. Paul	St. Paul to Spokane	Total	Same shipments to Coast would earn.	Amount the roads would earn from St. Paul to Coast on Coast Shipments.
Iron, Bar and Rod, From Mineque, Col.	....	....	....	....	672.33	460.02	....
Iron Bar	....	49.72	39.77	440.82	530.31	331.44	241.95
Iron, Pig	....	60.00	25.20	299.80	385.00	340.00	254.80
Iron, Plate	....	....	91.75	842.00	933.75	649.56	557.81
Iron, Plate	....	....	90.62	831.62	922.24	641.56	550.94
Iron, Plate	....	....	90.65	831.93	922.58	641.70	551.05
Iron, Plate	....	....	91.66	841.17	932.83	648.92	557.26
Iron, Plate	....	....	93.31	856.31	949.62	660.60	567.29
Iron, Plate	....	....	62.40	572.56	634.96	441.72	379.32
Iron, Plate	....	....	70.22	644.39	714.61	497.12	416.90
Iron, Structural	160.74	....	66.71	801.31	1028.76	642.98	415.53
Iron, Structural	....	87.48	69.26	776.38	933.12	583.20	426.46
Iron, Structural	64.78	....	26.88	322.95	414.61	259.11	167.45
Iron, Structural	103.15	....	42.81	514.23	660.19	412.62	266.66
Iron, Valves	....	25.20	25.50	393.30	444.00	210.00	159.30
Machinery	....	53.64	64.96	382.04	500.64	44[illegible].00	328.40

In the Nevada case No. 1665 before the Commission there appears a map setting forth vividly and clearly (19 I. C. C. 241, first report), the discriminations which exist as to all of the intermountain country—from the Canadian to the Mexican boundaries. It was held in that case as follows:

> "From an examination of the tariffs it appears that the transcontinental commodity rates—rates from eastern defined territory to the coast terminals—are at the present time higher than they were ten years ago by a very considerable percentage and this regardless of the fact that the base of supplies has been constantly moving west-

ward, thereby narrowing the distance between point of production and consumption. * * *

"As we have seen, the rates are higher on almost all commodities from eastern producing points to Reno than on these same commodities to Sacramento, the more distant point. Without explanation this constitutes a violation of the long-and-short-haul clause of the act. The carriers justify the lower rates to the more distant point upon the ground of water competition. They say that the rates charged to Reno and other Nevada cities are reasonable in themselves measured by the cost of the service to the carrier or the value of the service to the shipper, and that rates to the coast cities measured by these standards are too low to be considered reasonable and would not be in effect but for the force of water competition. The Nevada commission, on the other hand, contends that while some commerce does move from the Atlantic seaboard by water, the volume is so small that it is not influential in determining the present rate to the coast terminals; that the coast rate itself is reasonable, and therefore that the application of a higher rate to an intermediate point can not be justified. The making of higher intermediate rates, they strongly urge, is a matter of railway policy and not of railway necessity, in that the railways wish to develop the coast cities as jobbing centers to the exclusion of interior points; that the revenues of the carriers would not be seriously impaired were this policy abrogated and as low rates given to the inter-mountain country as are now extended to the coast cities.

"It is no reflection upon the Traffic manager of a railroad to say that he bases his rates upon some line of policy. He deals directly, and in most cases exclusively, with the producer or the jobber. His concern is to keep these patrons satisfied and at the same time bring to his railroad the greatest possible revenue. This is what he means by saying that he charges what the traffic will bear. He regards as reasonable whatever rate will make for the best interest of his road, and in determining this he adopts a line of policy which affects either favorably or unfavorably the industrial growth of the communities which the carrier serves. The restrictions of the act to regulate commerce are governmental limitations placed upon the unlimited and arbitrary discretion of traffic officials. While the latter may adopt policies which they regard as most favorable to their roads, such policies must be restricted by the inhibitions of the law which this Commission must enforce. The policy of making Reno rates based upon those extended to the more distant point may not be justified upon the ground that Reno traffic will bear that imposition, but may be justified by conditions obtaining at the more distant point which the carrier may meet without offense to any provision of the act.

"And this brings directly to our consideration the question of water competition at Sacramento and other coast terminals. It is, of course, a physical fact that commerce may be carried by water from the eastern seaboard to the Pacific coast. It is admitted by all, and substantiated by the evidence in this case, that some commerce does

actually so move. An estimate has been made by complainant that approximately 3,000,000 tons of transcontinental traffic reaches the coast terminals during each year by rail, while the highest figure given as the volume of traffic reaching those points by water from the eastern seaboard is under 10 per cent of the rail movement. The fact, however, that it moves in large or small quantities does not of itself sustain the contention that the present rates from eastern defined territory to coast terminals are so low as not to make a reasonable return to the carrier for the service performed. A movement of traffic may be affected by water competition at a more distant point and yet a rate made up of the combination of the rate by water plus the rate back be unreasonable and unjust. Nevada, Utah, Arizona and Idaho are nearer to the Pacific coast than to the Atlantic, but this does not of itself justify charging them overland rail rates which will give them none of the advantage arising out of their shorter distance to an eastern base of supplies. Nor does it follow that a rate to a point on the seaboard is lower than would be justified if that point were not so situated. In short, it is not sufficient to state that the terminal points are situated on the water to excuse the imposition of higher rates at intermediate points.

"There has been little difficulty experienced from time to time by the rail carriers in raising rates to the Pacific coast; the only live water competitor on the Pacific today is a line which bases its rates on the rail tariffs, and the rates of both the rail and the water lines change simultaneously.

Ways can be found, and have been found, by which the presence of the ocean as a controlling, or even greatly meddlesome, factor in the fixing of railroad rates can be nullified. There is no doubt but that rail rates have been influenced at times to all the Pacific ports by water carriers, and of course there is the possibility that at any time this water competition may become seriously aggressive and potent. The United States is not a maratime nation at present, and her great coast line on the Pacific side is served in great part by such water carriers as the railroads permit to live.

"While, therefore, physical conditions at the coast are dissimilar to those at interior points the rates to the coast are not necessarily less than in fairness the traffic should carry. The water carriers between the Atlantic and the Pacific coasts at present charge rates from 25 to 40 per cent less than their railroad rivals. To get this business the water carrier at the eastern port reaches inland and absorbs a rail rate of 20 cents upon commodities which carry more than a 50- cent water rate to the Pacific coast. The American-Hawaiian Steamship Company then transports the freight by water to the Tehuantepec road, where it is transshipped across the Isthmus, and being loaded again is carried to a Pacific coast port and there reshipped either by rail or water to certain designated points of destination inland from the port. In such a movement there is involved a rail haul of 400 or 500 miles, at least six, and possibly more, separate handlings of each parcel of freight, and a haul by water of fully 5,000 miles. Freight moving via Panama is sub-

ject to even heavier conditions. It is insisted by the Nevada commission that water competition of this character is not sufficiently aggressive or formidable to compel the railroads to make any other rates to the coast terminals than those which from reasons of policy they are at present making. The suggestion is not without pertinence, that if four different transportation services, three by rail and two by water, involving at least six handlings of the freight and a total haul of 5,500 miles, can be furnished profitably at from 60 to 75 per cent of the rail rate, the compensation to the rail carrier for an all-rail haul of 2,500 miles, with no handling and but two terminal charges, should produce ample revenue to the rail carrier.

"There are many interesting developments in this and other transcontinental cases touching this matter of competition by water. For instance, the lowest rate does not in all cases apply to and from the seacoast points. There are many commodities upon which the rates from Chicago and Kansas City to Sacramento and San Francisco are less than they are from New York. And yet it is said to be the competition from New York that produces the low rate. In no case is the rail rate from New York less than is the rate from other portions of eastern defined territory, while of course in all cases New York is nearer the source of the competing force, the ocean. This is accounted for by the carriers on the ground that by taking the same, or a lower, rate from the interior points to the coast terminals the rail carrier avoids the longer rail haul, the points of origin and

destination being nearer together. This is an application of what the carriers term 'market competition,' but it is not a strong argument to sustain the theory of water competition.

"As usually applied by carriers market competition results in the hauling of commodities produced at places distant from the point of consumption to compete with the same commodities from points nearer to the point of consumption. In this case, however, market competition is said to be the controlling factor which justified a rate from an interior point less distant from destination. Thus we have a $3 rate from New York to Sacramento to meet water competition, and a $3 rate from Kansas City, to meet market competition. We also have a $4.29 rate from Kansas City and from New York, to Reno, as a reasonable rate because of water competition from New York to Sacramento.

"We do not regard the divisions of rates as in any wise conclusive as to the reasonableness of rates between certain points, but such divisions are sometimes of significance. In the present case we find that if 100 pounds of freight is shipped from Boston, or New York, or Chicago, or St. Louis, or Omaha, to Sacramento on the $3 rate, and another 100 pounds of the same kind of freight is shipped from the same points to Reno on the same day, the carriers east of Ogden receive precisely the same earnings upon both shipments; but the Southern Pacific, west of Ogden, receives far more upon the Reno shipment than on the Sacramento shipment. * * *

"Neither at the hearings nor in the ar-

gument did the carriers east of Ogden contend that their divisions of these rates were unreasonable. The Southern Pacific, however, the carrier which make sthe last 700 miles of a 3,100-mile haul, strenuously insists that its rates to the more distant points are compelled by water competition for the purpoes of defending higher rates to intermediate points; while the carriers performing 2,400 miles of that service appear to regard the rate as entirely reasonable. The line from New York to sacramento and Reno constitutes a through route and in law the carriers engaging therein constitute one line. If the Sacramento rate is less than a reasonable rate and the result of competition then it would seem fair to assume that all of the carriers engaging in the transportation so consider it and would accordingly demand a lesser division than the division they would be justified in requiring out of the higher rate to the intermediate point. The fact remains, however, that for the 2,400-mile haul from New York to Ogden the New York Central, the Lake Shore, the Northwestern, and the Union Pacific secure the same revenue out of the $3 rate to Sacramento that they do out of the $4.29 rate to Reno. This is graphically illustrated by the following diagram showing the division of the rate: * * *

"We have gone extensively into an investigation of the conditions surrounding this traffic and in anywise governing the basis upon which the rates to Nevada from the east should be governed. What has been said herein gives little more than a suggestion of the extent of the inquiry

which has been made. We have, for instance, had reports made upon the financial condition of the carriers involved, and their ability to meet any reduction which the Commission might direct without serious impairment of their revenues, an interesting fact in this connection being this: During the past two years the operating revenues of the Southern Pacific Company's Pacific system have increased $8,000,000 while its operating expenses have decreased $5,000,000, thus producing an increased operating income of over $12,000,000, or a net increase of about $2,000 per mile of road.

"There appears in the record a compilation from the statistics of this Commission for the years 1898-1907 in which it is shown that in these ten years the carriers in the Pacific coast territory doubled their freight tonnage, which rose from 18,000,000 to 35,000,000 tons; almost doubled their gross revenue; their receipts per mile increased over 70 per cent; their receipts per ton per mile increased from 1.07 to 1.25, or about 20 per cent; while the relation of expenses to earnings remained practically constant at 62.50 per cent. These figures are for all the roads in the Pacific territory. But if we take the Central Pacific alone we find it third in the list of Pacific coast roads in tons carried and the highest of all in freight earnings per mile ($13,453 per mile in 1907). While it is one of three railroads in the west carrying over a million tons of freight per mile of road—the average for the United States—the earnings of the Central Pacific per mile are 65 per cent greater than the average for the United States and 100 per cent greater than the average of the roads west of Chicago.

"THE TIME HAS COME, IN OUR OPINION, WHEN THE CARRIERS WEST OF THE ROCKY MOUNTAINS MUST TREAT THE INTER-MOUNTAIN COUNTRY UPON A DIFFERENT BASIS FROM THAT WHICH HAS HITHERTO OBTAINED."

The later devision of the Interstate Commerce Commission in the Nevada case (21 I. C. C. ——) fully reviews the history, extent and influence of water competition as follows:

"Turning our eyes eastward and regarding the territory in which originates this traffic it is at once appreciated that the same rate applies whether the traffic comes from New York harbor or from Chicago or Kansas City. Now, it is not contended that there is any direct water competition from Chicago or Kansas City, or the territory intermediate between the Missouri River and New York. How, then, does it come about that the same rates apply from inland points as from seaports? To answer this question it may be well to look back over the very remarkable history of the long-fought struggle between the transcontinental railroads and the ocean carriers.

THE TROUBLOUS SEA.

In 1869, when the Union Pacific and Central Pacific railroads were united at Promontory Point, Utah, there was no such thing as a transcontinental rate, excepting as it was made up of a combination of locals. In fact, at that time it was not expected, so Senator Stanford has testified before a Senate committee, that there

would be any real competition between the transcontinental railroad lines and the ocean carriers. The original purpose of constructing the Central Pacific road, so far as its California promoters were concerned, was to carry eastward from the Pacific coast to the interior, and the rates made across the Sierra Nevada Mountains were made to meet and overcome the then existing competition of the mule team. It was not the primary purpose to extend this road across Nevada, but only to furnish a means of communication between the city of Sacramento and the rich mining towns along the ridge of the Sierra Nevadas and on their eastern slope. Confessedly it was the lure of the government subsidy which induced the extension of this line to the eastward. The purpose of the Central Pacific was to act as the distributor of the ocean-borne freight which was brought into the Bay of San Francisco by sailing ship coming in around the Horn; and for some time following the establishment of this through transcontinental route no serious effect was apparently made to induce the all-rail overland movement of traffic, which did not require especial or express service.

The first through rate published was an open rate of $8 per 100 pounds, first class. This rate was scaled down, being lower from Pittsburg, and still lower from Chicago and other points. When competition was begun with the clipper ships out of New York, class rates were reduced to a $6 scale, and these were graded from the east westerly. Commodity rates were also at this time established in an effort to take

from the ships important volumes of business. These open rates, however, were found to be unsuccessful in developing any considerable amount of transcontinental business, owing to the fact that whatever rates the railroads made were met by the boat lines. Accordingly in 1877 the Union Pacific and Central Pacific, which worked together in this matter, instituted what is known as the special contract system, under which they published two rate sheets, one known as the "white list" and the other as the "pink list." The white list contained the open or public rate; the pink list contained the contract rate. Contracts were made with individual shippers that if they would give to the railroad line all of their traffic for a year to the exclusion of ocean carriers they would have a rebate down to the figure fixed in the pink list.

The battle began in earnest at this time between the railroads and the ocean lines. Whatever competition there had been before was insignificant when compared with that which followed the year 1877. At that time the railroad interests evidently determined upon driving the ships from the sea, and they very proudly admit that they succeeded in their effort at least to the extent of nullifying or controlling the water competition. The jobbers of the Pacific coast were individually dealt with; their waybills by the water lines were furnished to the railroad, from which it estimated the volume of traffic and the amount of charges paid thereon by the shipper. Upon this basis a rate was made by adding to the ocean charge an additional allowance for the saving in insurance arising out of move-

ment by rail, the saving in interest upon the value of the freight, and an additional amount for the comparative certainty of delivery and expedition. Different rates apparently were made to different shippers. This secret contract system, by which a rate was made to each individual, firm, or shipper, was a logical application of the principle that the carrier should charge what the traffic would bear. For several years this system was successfully pursued with increasing advantage to the railroads; but under the pressure of strong popular agitation, and owing to the fact that the shippers were in many cases found to have broken faith, the railroads determined upon again publishing but one rate. To arrive at this rate they adopted a policy of "harmonization," as it was termed; they averaged the rates upon various commodities which had been charged to various shippers and made a new schedule of rates, from which they varied as emergency might require or expediency advise by the current method of rebating.

Thus far we have taken no account of the Panama route, which had been open and operated since the early days of the rush to the gold fields. This route was in the control of the Pacific Mail Steamship Company. In 1871, hardly two years after the opening of the transcontinental rail route, the Union Pacific and Central Pacific railroads entered into agreement to subsidize the Pacific Mail, buying its space at an agreed figure, and often running the steamships empty. This arrangement was continued until 1881, when the steamship line was turned over to an association

known as the transcontinental association, which continued the arrangement until 1893, so that during this period the Panama route offered no serious competition to the rail lines. And to continue the history of this negligible factor in sea competition, it may at this time be said that the Pacific Mail Steamship Company is now controlled, through stock ownership, by the Southern Pacific Company, and has been since the year 1900.

Throughout this period of competition between ocean and rail lines we find this interesting rate condition to have existed: Class rates to Pacific coast terminals increased with the distance and were higher from Atlantic seaboard points than from interior points; commodity rates, however, which were created to meet special conditions at the seaboard—the weapons fashioned for the destruction of the clipper ships—were lower at the ports than at the interior points. In the language of Mr. Luce, of the Southern Pacific—

"Commodity rates were scaled up from the seaboard in the first instance, but the class rates were scaled down from the seaboard. There was always a higher class rate from New York than from Chicago, but often a lower commodity rate from New York than from Chicago."

In 1883 a new competitor entered the field—the Sunset Gulf route, a water line from New York to New Orleans owned by and connecting with the Southern Pacific line from New Orleans to San Francisco. This new line was looked to by the carriers generally to "take care" of water competition, in the significant language of a South-

ern Pacific official. It entered upon the work with such heartiness that before long the Pacific Mail alone kept on its perfunctory way between Panama and the Pacific coast terminals. The clipper ship as a competitor had been destroyed, Pacific Mail had been subsidized, and the transcontinental lines were in control of ocean as well as land transportation.

It is the estimate of the Southern Pacific that of all the traffic moving from the Atlantic seaboard to California from 1885 up to 1891 the Sunset-Gulf route carried from 75 to 90 per cent, and of the balance practically all went by rail. The aggressive policy of the Southern Pacific Company in instituting a water line of its own between the Gulf and the Atlantic drove its water competitors out of the field and took from the rail lines all but the most insignificant proportion of transcontinental traffic. Those were the fine free days when "all sorts of rates could be had and all sorts of tariffs could be found."

THE SANTA FE ENTERS THE FIELD.

By the year 1885 competition by sea was not more than nominal. In that year, however, the Santa Fe, being completed to Los Angeles, came into the field claiming its share of transcontinental business destined to its new terminal, California. Up to its coming, and for some years prior, commodity rates had been graded up from New York; that is to say, the rates from Pittsburg territory to California, and from Chicago to California, were higher than from New York. The theory of the rail

carriers was that they should meet the competition at the point where the competition actually existed—at the seaport. But the Santa Fe had its eastern terminus in Chicago. It found the Sunset-Gulf route carrying practically all of the Atlantic seaboard business at rates below the all-rail rates—at any rate that it chose to fix. In its view it was all well enough for the Southern Pacific to send out from the Gulf its own boats that would drive all rivals from the ocean, but because it had done this service to the rail carriers it was not to follow that all the traffic was to remain in the possession of the Southern Pacific. Whatever rates, therefore, the Sunset-Gulf route chose to make at New York the Union Pacific and Santa Fe declared they would make from Chicago. This determination of railroad policy was given the name of "market competition." It was said that the great middle west was building up and should have its opportunity to compete with the Atlantic seaboard for the developing trade of California. The Santa Fe did not reach New York; the Southern Pacific did; the Santa Fe would give to Chicago and to St. Louis and to Kansas City the same opportunity to feed and clothe the people of California that the Southern Pacific gave to the people of New York and Boston. Then followed an interesting rate war, which culminated in 1887 in the installation of a new set of graded rates, this time scaling lower as they receded from the Atlantic seaboard.

The date in this case is significent, for in that year (1887) the act to regulate commerce went into effect.

We find then with the first tariffs that were filed with the Commission a $3 first class rate from New York to San Francisco, a lower rate obtaining from Pittsburg, a still lower rate from Cincinnati, and so by steps to the Missouri River. These graded rates remained in effect until 1889 when we find the first evidence of the institution of a great eastern blanket of class rates. This was at first not formally recognized in the tariffs, but was effected by eastern carriers through a system of rebates from the published rates.

Things appear to have gone peacefully for the next few years. The only serious competition which the railroads met by water was that of the Southern-Pacific-Sunset line from New York which apparently applied from the New York piers whatever the all-rail rates were from Chicago. Of course during this period, or any other period, until recently it is impossible to say just what the rates actually paid were. We are dealing, however, with the "paper rates."

A MERCHANT'S LINE.

Live ocean competition being out of the way, and the railroads having come to an understanding as between each other, matters went smoothly until the San Francisco merchants, in 1892, being roused to activity by a recent increase in the transcontinental rates, instituted a boat line of their own. This brought on another rate war, in which the merchants lost heavily, and rates were reduced by the rail lines to absurdly low figures. The lines east to Chicago and those west fell out over the division of the joint

through rates, and for a time there were no joint through rates extending from points farther east than Chicago, and blanket rates were made by the western carriers from Chicago, Mississippi River, and Missouri River points. After the railroad lines had killed off the San Francisco merchants' steamship line, losing thereby several million dollars, they came to an agreement with their eastern connections as to a new basis of divisions and a new scheme of rate making.

Thus we come to the year 1896, at which time the blanket system at present obtaining was first authoritatively announced. This blanket extended from the Missouri River to the Atlantic seaboard. We hear very little of water competition for the next three or four years. In 1900, however, the American-Hawaiian Steamship Company established its first steamer line through the Straits of Magellan. In 1900 also, as we have already seen, control of the Pacific Mail was purchased by the Southern Pacific Company. Neither one of these facts seems to have disturbed transcontinental rail rates.

In 1906 another step forward was made in the matter of water competition by the opening of the Tehuantepec route. The American-Hawaiian Company, under an arrangement made with the Mexican government and with the sugar planters in the Hawaiian Islands, instituted the most satisfactory service which up to that time had obtained between the Atlantic and Pacific seaboards by water. East-bound tonnage was furnished by Hawaiian sugar, and

west-bound tonnage was gathered at the Atlantic seaboard.

In 1907 the volume of west-bound business carried to Pacific coast terminals via this route was 112,395 tons; in 1908, 117,203 tons; in 1909, 204,000 tons; in 1910, 239,500 tons. The total volume of transcontinental tonnage was, two years ago, estimated by the carriers at 3,000,000 tons per annum, while the total water-borne traffic is about 10 per cent of this figure. Inasmuch as the traffic of the country increases at the rate of nearly 10 per cent per year, it would appear that in nearly four years ocean competitors of the transcontinental rail lines have been enabled to secure a total tonnage of approximately the normal increase in west-bound transcontinental freight for a single year. In giving this figure we are allowing to the American-Hawaiian line all the advantage of the accumulated business of the six years preceding 1906, in which it had in operation its steamship line through the Straits of Magellan. Considering that this carrier has reduced its time of movement between the Atlantic and Pacific to an average of a little more than 25 days and gives a service that never before has been equaled by an ocean line, the slight increase in its tonnage either evidences that all-rail rates are more attractive for the great volume of business or that the water rates are maintained at a figure so nearly approximating those extended by the rail lines as not to overcome the difference in the service.

THE OCEAN "NEUTRALIZED."

We have thus traced the history of this protracted struggle between the ocean and

the land carriers that we might clearly appreciate the strategy of the railroads and its effect upon the ocean-borne traffic. One water route after another has been rendered innocuous. To meet the competition of the railroads the tendency of the ocean carriers has been to shorten the time consumed in passing by water from coast to coast. The clipper ship has been forced to give way to the steamship and the steamship has been compelled to transship by rail a portion of the distance. The routes by way of Cape Horn and the Straits of Magellan have been virtually abandoned. For nearly 40 years the Panama route has been under railroad control. When an attempt was made to re-establish this route as a vital competitor, the railroads used their own ocean-and-rail line to eliminate it from the field. So that for several years there has been but one ocean line which apparently has no railroad connection, that of the American-Hawaiian Steamship Company; and this line lives upon sufferance, its rates being made with the knowledge of the railroad company and with a more or less definite relation to the transcontinental rail rates. Within the past few months another water competitor has entered the field, the California-Atlantic line, which has done an extensive business both east-bound and west-bound for the short time that it has been in existence, but the prophecy made by the railroad witnesses is that it will not last long.

In the light of this history it is not to be gainsaid that the transcontinental lines must give consideration to sea competition For 30 years and more their effort has been

to "neutralize and control" such competition, in the phrase of Mr. Stubbs, vice president of the Southern Pacific system. While they have subsidized, bought, and controlled the water carriers, there has always been present to the mind of the traffic manager of the transcontinental railroad the existence of the ocean and the possibility of its use. Without a ship upon it the ocean has the power to restrain, in some degree, the upward tendency of rail rates. A railroad may not safely indulge its desire to impose all the traffic will bear between two ocean ports, and it may truly be said that the least poetical of railroad traffic managers never looks upon the ocean without a sense of awe.

The railroads, moreover, must soon meet with a competition by water more intense than any that they have heretofore, suffered, for within three years another route, one more important, searching and determinative in its effect upon railroad rates than any other, will be opened—a route all water by way of the Panama Canal. The cutting of this conal will in effect bring the Straits of Maggellan 3,500 miles to the northward, and with modern steamships it is estimated that San Francisco will by water be removed from New York but 14 days.

EVOLUTION OF BLANKET SYSTEM.

While the ocean has been potent in affecting rates, it would be idle to say that we know or can ascertain the degree of this influence. In the very first place we do not know what rates the shippers paid. The

published rates until within very recent years give no indication of what the actual rate paid was. And, furthermore, rates to the Pacific coast have been the subject of commercial forces and railroad policies to an extent which is probably without parallel in our railroad history. It may not be valueless, however, to review the rise and fall of class rates since the year 1887, when tariffs were first required to be filed, and to take a glance at the influence on commodity rates of the rate competition of the immediate past. As has already been noted, the first tariff filed with the Commission was one which is said to have approximated the actual rates which had been collected, and this was the result of a coming together of the carriers after a troublesome rate war. The scale as to first class traffic ran: To San Francisco from New York, $3; from Pittsburg, $2.70; Detroit, $2.55; Chicago, $2.40; Mississippi River, $2.30; Missouri River, $2.10. This tariff was soon followed by another—that of January 16, 1888—which began with a rate of $4 from New York, the rate from Chicago being $3.25. On September 1, 1888, however, owing doubtless to this feud between the eastern and the western carriers which has been herein referred to, we find the $4 scale in effect; from Buffalo and Pittsburg, as from Toledo and Detroit, the rate, however, was $3.95; Chicago, $3.90; Mississippi River, $3.70; Missouri River, $3.50. Four months later, January 1, 1889, a rate of $4.20 from New York was put in, the difference between the New York rate and the Chicago rate being 30 cents. This set of class rates seems to have

continued until April 11, 1893, when another rate war, as we have noted, was begun, these rates being on the scale of $3.70 from New York, $3.40 from Chicago, $3 from the Missouri River. But hardly were these rates in effect when all rates east of Chicago were canceled as of May 11, 1893, and for four years there appear to have been no joint through rates in effect from any point east of Chicago. On July 16, 1894, the rate from Chicago to the Pacific terminals was reduced from $3.40 to $2.40, which was the blanket rate from Chicago, Mississippi River and Missouri River terrritories. Three years later came an adjustment with the eastern carriers by which they put in from New York, Pittsburg and Detroit a $2.40 scale, and thus for the year June, 1897, to June, 1898, the $2.40 scale from all points east of the Missouri River obtained. This was the first blanket from the Missouri River to the Atlantic seaboard. Hitherto the rates had been graded up to New York, the more distant point carrying the higher rate as to class traffic. However, on June 25, 1898, a $3 scale covering the same territory went into effect. Not yet, however, was the blanket perfect, for neither in the scale of 1897 nor in that of 1898 were the same rates carried from points west of Chicago that were carried from Chicago and points east thereof. This was remedied, however, on January 18, 1904, six years later, when the rates on the lower classes from the Missouri River and the Mississippi River were raised to equal those of Chicago. For five years this condition continued, until on January 1, 1909, a further

increase in the lower classes was made, but this time as to New York and Boston territories, the increase being effected by eliminating the blanket rates as to all classes below fifth.

RATE CHANGES IN TWENTY YEARS.

If we make a further study of these tables which will be found appended hereto (see Appendix A) as to the rates from Chicago, Mississippi River, and Missouri River points, we will observe some facts that are not uninteresting. The rate today from the Missouri River to the Pacific coast is 90 cents higher, first class, 85 cents second class, 80 cents third class, than it was nearly 25 years ago. The lowest class which we now have is class E, which from the Missouri River at present is 95 cents; the lowest class in 1887 carried a rate of 68 cents. From the Mississippi River the lowest class is today 20 cents higher than in 1887; the highest class is 70 cents higher than in 1887 from the Mississippi River. It is perhaps not altogether fair to compare the lowest classes because there were more classes formerly than at present. The rates from Chicago, Mississippi River, and Missouri River, for the four years 1894-1898 were 60 cents less, first class, than the present scale.

There have been two periods of intence water competition since the year 1887, when the act to regulate commerce went into effect. One following the establishment of the Merchants' line via the Panama route, the other immediately following the establishment of the Tehuantepec route

in 1906. The effect on commodity rates out of New York of the establishment of the Merchants' line of steamships has already been adverted to in the testimony given by Mr. Luce of the Southern Pacific. In order to ascertain the effect upon commodity rates of the establishment of the American-Hawaiian line we have secured from the carriers a statement of the fluctuations in their rates since the year 1906, from which it appears that notwithstanding the presence of what purports to be active water competition, commodity rates by the rail carriers have been increased rather than lowered during that period. Out of 1,535 commodity rates compared by the carriers is appears that no change has taken place since December 1, 1906, as to 696 of such commodities, reductions have been effected in 287, advances and reductions as to 132, and advances as to 418. Of the items increased, the rates on 318 commodities were increased from the whole eastern blanket. The reductions in the greater part were effected by taking single articles from the classification and giving to them commodity rates from all points of origin.

RAILROAD POLICY.

We have noticed how through the years this blanket of class and commodity rates has been drawn westward from the sea-competitive point until it extends two-thirds of the distance across the continent. How have the carriers justifled this blanket to the coast but not to intermediate points? Long before the blanket had been stretched to its present western extent the communiti-

ties intermediate between its eastern border and the Pacific made protest against the injustice that was being done. For nearly a quarter of a century this complaint has been heard and has ceased at times only to be revived with greater earnestness. A line of railroad policy which leads to such result may be presumed to have in it something artificial and unnatural. That which appeals to us as unnatural in this situation is that rates which are said to be less than reasonable because compelled by ocean competition are made from points where we can find no such competition. It does Reno no injustice for the transcontinental lines to give San Francisco a rate from New York that will enable them to carry traffic as against the ocean carriers out of New York. By such policy Reno secures the advantage of her proximity to San Francisco, an ocean terminus. If the ships out of New York find it profitable to pay the railroad rate from Pittsburg to New York in order to take the freight from the transcontinental lines, a rail rate which will meet this competition at Pittsburg is permissible. It is fairly established that the influence of water competition does not cease at the Pittsburg-Buffalo line, but extends westward as to certain particular commodities, and doubtless for some distance west of Pittsburg the carriers may properly make rates which will prevent the movement eastward to the seaboard instead of westward over their lines, but we look in vain throughout the records of this Commission for 20 years to find any but the most fragmentary evidence that sea competition extends to Chicago. On the con-

trary, it is the admission of the carriers themselves that the rates which they make from Chicago to the Pacific coast terminals are established in order that the manufacturers and the jobbers of the west may compete on a level with the jobbers and manufacturers who have the advantage of a location at the Atlantic seaboard.

* * * * * *

INDUSTRIAL MOVEMENT WESTWARD.

Whatever the reason, the fact stands forth throughout this record that the source of supply upon which the far western communities largely draw their manufactures has within half a century moved westward from the Atlantic seaboard, so that, as was found by the railroad commission of Nevada from an analysis of the billing of actual shipments into Reno, 75 per cent of their traffic coming from the east originated no farther east than the longitude of Chicago. There are cotton mills as far west as Kansas City; mining, milling, and farming machinery is produced more largely in and about Chicago than in any other section of the country; boots and shoes, hats and clothes, cooking utensils and the multitudinous articles of domestic use may be secured in large part without coming east of the Alleghenies; in fact, the center of those industries which supply the far west apparently is not far removed from the center of population of the country. This is a pregnant fact. It was announced by the Santa Fe officials, when they opened their through line from Chicago to Los Angeles, that they thought it

the part of wisdom to make their rates lower or as low from Chicago than from New York, so that the industries of the middle west might develop. They would make their line independent of their eastern connections in so far as that was possible, and instead of bidding against the shippers of the seaboard for traffic destined to the Pacific coast they would develop industries close to their own eastern terminus which would supply the western demand, and thereby develop a traffic for the lines west of Chicago which need not be divided with the carriers east of that city—an exclusive traffic, one which could be carried at rates more compensatory than any that could be had out of the division of a through coast-to-coast rate.

This policy was determined upon by the carriers running west from Chicago 25 years ago. From the date of the first transcontinental tariff that we have upon the files of the Commission Chicago has never paid a higher rate to reach a Pacific coast terminal than has New York, either upon classes of commodities. The water competition of the seaboard has never been strong enough since 1887 to compel a reduction of rates from New York which the lines out of Chicago did not feel fully justified in meeting at that point. And, be it noted, at the time that this policy was begun there was no water competition between the coasts save by an occasional tramp boat and such other ships as the railroads themselves positively and admittedly controlled. It would not be claimed that this policy was the sole cause of the steady march of industry to the westward during the past

quarter of a century. Nevertheless we find the fact that there is now hardly a need which the people of the far west have that can not be supplied from territory nearly 1,000 miles nearer to them than was their source of supply 25 or 30 years ago. Rates that were introduced then purely for market competitive reasons may be today reasonable in themselves. So, too, rates then established from Chicago to meet conditions at San Francisco, a competitive terminal, and justifiably made lower to that more distant point than to intermediate points, may in the course of years have become, by reason of increased volume of traffic, growth of pouulation, and new methods of operation so reasonable as to make the imposition of higher rates at intermediate points unjustifiable. We see strong suggestion of this in Mr. Morton's testimony given 10 years ago when none of these carriers was carrying nearly so large a traffic or operating so economically as they are today, when the intermediate territory had not yet been exploited as it is now, when dry farming was unknown, and the irrigation of the desert through the aid of the government no more than a statesman's dream.

AN ARTIFICIAL ADJUSTMENT.

It is not provable, but there is much reason to support the statement that if all the producing territory—the fruit and vegetable growing, mining, and lumbering territory—which does not receive the benefit of terminal rates, and which is compelled to pay the rate to the coast plus the rate back upon its commodities of eastern pro-

duction, were taken from the transcontinental carriers they would be on the verge of bankruptcy in but a short time. Surely a railroad policy adapted to the conditions of one day may properly change with the conditions of another, and in the very nature of things it must be apparent that the transcontinental carriers can not continue forever charging higher rates to the intermountain country than to the coast from the middle west. The condition is too artificial to last. The carriers have taken from San Francisco in large part the advantage that she should enjoy from her situation upon the ocean by throwing around her a circle of terminal points 100 miles or so inland. By doing this they have forced water carriers to meet rail competition at these interior places, and yet the railroads urge that the rates are made to meet ocean-to-ocean competition. In the east they have stretched the blanket from Portland, Me., to Denver, Colo., a distance farther than from Antwerp to Moscow, but they refuse to admit that from any point along this long line it would be justifiable to make the rates given to the coast terminals applicable to Reno.

Furthermore, we find that this situation is artificial in that is has been brought about by a procession of agreements between carriers. Each carrier has been appeased by giving to it something which would cause it to be satisfied with the arrangement. The carriers have competed with each other across a table until their minds agreed upon a condition that would prevent rate wars. It is wholesome and beneficial that the body politic should not

be disturbed by rapid fluctuations in rates of transportation which tend to destroy the stability of commerce and imperil the fortunes invested in such transportation facilities. If society does not undertake to regulate the methods by which a natural monopoly such as a railroad may be profitably conducted it is not to be expected that such a monopoly will not seek to protect itself, even at the disadvantage of the public it serves.

The result of such self protective measures, however, must be such as neither to offend the law nor be opposed to the development of the country and the instinct of its people for fair play.

If now we have apprehended aright the intent of Congress there comes before us upon an application for permission to deviate from the prohibitive clause of the fourth section the inclusive question whether by such deviation any provision of the act will be violated, and the burden rests upon the carrier to satisfy our minds that no such result would be effected by the granting of such permission—that no injustice will be done to the intermediate point with relation to the more distant point. As already said, the purpose of the statute which we are required to enforce is, succinatly stated to preserve harmony between communities, individuals, and carriers, to allay discord, and prevent, so far as may be, oppression and injustice. The unhampered exercise of a railroad policy may make for the material benefit of the carrier—at least for its immediate profit—but work a wrong with which the public must concern itself. To be concrete, it may

be (although this fact has not been established) that it is to the financial interest of the transcontinental carriers to make the same rates from the Missouri River as from Chicago, Pittsburg, and New York to the coast cities which lie on or near the ocean's edge and compel the intermediate points to base their rates upon these coast terminals; but this decision on their part is certainly subject to review, and when Congress says that this Commission "may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section," it means to lodge with this body, if it means anything at all, the power to pass in judgment upon the effect of a railroad policy which departs from the intendment of the law. A community is entitled to something, more than a reasonable rate; it is entitled to a nondiscriminatory rate. A carrier may not say, "We will give to this community a reasonable rate" and meet the full requirement of the law; it must view its rates as a whole and see to it that they effect no advantage or preference to one community over another which does not arise necessarily out of the transportation advantages which the one has over the other.

MARKET COMPETITION.

Ocean competition, say the carriers, brings about the lower rates from coast to coast; market competition produces the lower rates from the interior to the coast. We have considered ocean competition and see how real was its effect and how the carriers dealt with it. "Market competi-

tion" is a phrase with which the railroad traffic manager too often conjures. When no other force can be found which brings about a discrimination, market competition is advanced. It is both a sword and a shield; it is used to protect the carrier against attack because of undue discrimination as between communities, and it is a weapon of offense as well, by which one carrier invades the territory of another upon a different basis from that which it grants to its own immediately dependent communities and forces concessions from its rival carriers.

Market competition, as we have seen, is a euphemism for railroad policy. The history of the fourth section makes clear that it was born out of a desire, and has been amended out of the purpose, to restrict the force and effect of market competition. The examples cited before Congress by those who have advocated an absolute long-and-short haul section have largely been such as arose out of railroad policy, not such as were developed by transportation competition. Congress, however, has not seen fit to say (and perhaps most wisely so) that this economic force shall not be allowed to have its play in the making of rates. Market competition must be considered as one of those circumstances affecting a rate situation with which we are called upon to deal. But may it not be said that while the language of the statute does not say that market competition shall not be allowed to justify the charging of the higher rate to the nearer point, the very spirit of the section makes against the free application of any such justifying prin-

ciple? A national policy may veto a railroad policy just as a public need may overcome and set aside a private desire. Experience has demonstrated to the National Legislature that it is not safe to leave to the carriers the determination of the question what markets should be brought into competition with one another. The policy of Congress seems to be that a railroad may be compelled by transportation competition to make its rates lower than it otherwise would between two competitive points, and that this will justify a breach of the prohibition of the fourth section; but the desire of a number of shippers to reach a market is a force to which the carrier may not yield unless it can establish clearly that the adoption of such a policy will not unfairly discriminate against one community and in favor of another and will not produce those results which the law was intended to destroy. Clearly to allow for market competition as a sole and controlling factor under the fourth section is to render it nugatory, for this would be tantamount to saying that a railroad could justify every discrimination as between communities by the assertion of nothing more than its own determination of policy.

We must regard the proviso in the fourth section as subordinate to the preceding clause prohibiting the higher rate for the shorter haul, and to carry out this intent of the law a carrier must establish before this Commission, in order to secure an order of exception thereunder, more than merely its own desire to haul a great volume of traffic between two distant points; it must prove that by such a policy it will

not impose unreasonable rates upon any intermediate point, and that its policy will not work an injustice of which such intermediate point may fairly complain. Unless it does make such proof this Commission is not justified under the law in excusing it from adopting its rates to the more distant point as the basis for rates to the nearer points.

In this case and under these applications the Commission has given thought to many considerations not touched upon in this report, some of which are suggested by the tables to be found in the Appendix (C—D) hereto. Such, for instance, as the reasonableness of the transcontinental rates upon commodities in and of themselves when applied from different points of origin and the relation of the cost of service over the Central Pacific when delivery is made at Reno or at San Francisco. And when we have considered the return per ton-mile yielded by many of these rates it is not remarkable that other carriers from the east have pressed forward, even to their own temporary financial embarrassment, to reach these coast terminals. No other carriers in this country enjoy such long hauls upon so great a volume of high class traffic as do those transcontinental railroads. Their fine earnings are testimony to this effect, as well as to the competency of their management. If the principle that a railroad should charge what the traffic will bear is the criterion of railroad rates, no exception can be taken to the transcontinental situation, for it is masterfully designed to secure a maximum of revenue and yet develop such industries and benefit

such communities as the railroad in its dis-dom may wish to thrive, for the growth of the Pacific coast certainly is in no small part to be accredited to the discretion lodged in and exercised by the transcontinental traffic manager.

The coast cities—those that have direct access to the ocean—can not be materially injured by the policy of the law we have herein considered. They are rendered secure as entrepots of commerce by the presence of the ocean, so long as they choose to avail themselves of its advantages. There is much reason in this record too for the belief that they have at times chosen to forego these advantages in the expectation that they would be made secure by the rail carriers of a large distributing market in the interior. With the introduction of a policy which removes from these interior points in some degree the disadvantage under which they have suffered with relation to eastern points of production it will become a matter of moment to the coast cities to avail themselves fully of the ocean as well as develop industries upon the Pacific coast itself which will compete with the industries of the east for the interior trade. That which has been done in the middle west within a generation may certainly be accomplished upon the Pacific coast, so that there may come about a competition between real producing markets as well as competition between jobbing houses.

The carriers herein involved have not shown that undue discrimination was not effected by their rate adjustment between points in Nevada and points in California, nor have they established that the rates to

> the coast cities, if extended by them from eastern points outside the zone of water influence, are not fully compensatory.
>
> We desire to be extremely conservative in this the first application of the new law, and to require an adjustment of rates that will be safely within the zone of our discretion.

The City of Spokane is beautifully and naturally located upon a river which is capable of development and has developed a large amount of water power. To the south and west there is a large agricultural area. To the east and north are almost unlimited mineral and lumber resources.

There is no other large city within 300 miles. There are smaller cities within a less radius. The largest city within 200 miles does not have a population exceeding 25,000 people and is situated in an agricultural community.

The Government census of 1910 shows Spokane to have a population of over 104,000 inhabitants.

Transcontinental lines of railroad reach Spokane as follows: Soo Line runs from St. Paul to and connects with the Canadian Pacific and the Canadian Pacific connects with the Spokane International, forming a through route. The Northern Pacific and Great Northern lines

have main lines running from St. Paul into and through Spokane. The Milwaukee Company has a line which connects with the Oregon-Washington Company into Spokane. The Burlington operates into Spokane over the Northern Pacific and Great Northern lines. The Union Pacific, Oregon Short Line and Oregon Railway & Navigation Company (now the O.-W. R. & N.) also operate into Spokane. From Spokane a large number of branch lines are operated to the north, south and west.

Spokane is spelndidly and admirably situated and would make a large and prosperous Inland city and have a large consuming population if it had reasonable, just and equitable freight rates upon which to do business.

ASSIGNMENT OF ERRORS.

I.

The Commerce Court errer in granting a temporary injunction.

II.

The Commerce Court erred in granting a permanent injunction.

III.

The Commerce Court erred in holding the Interstate Commerce Commission exceeded its authority.

POINTS, AUTHORITIES AND ARGUMENTS.

At common law a common carrier of freight owed to the public a duty and obligation to treat everybody alike.

The theory of the common law was that the strong could not be preferred over the weak; that no favoritism should be shown; that all persons should be upon an equality and none treated unjustly or placed at a disadvantage. That this was the theory and purpose of the common law there can be no doubt or question.

Mo. Pac. Ry. Co. vs. Laberee Flour Mills Co., 211 U. S. 612; 29 S. C. R. 214.
N. Y. etc., Co. vs. I. C. C., 200 U. S. 361; 26 S. C. R. 272.
Western Union Tel. Co. vs. Call Pub. Co., 181 U. S. 99; 21 S. C. R. 561.
Atchison, etc., Co. vs. Demer, etc., Co., 110 U. S. 667; 4 S. C. R. 185.

The common law, however, did not furnish any adequate relief or remedy for the violation of that law. Shippers had the legal right, of course, to go into court and enforce by appropriate process and proceedings the rights, duties and obligations which the law gave and imposed. Owing to the expense, delay and opportunities which the carriers had to harrass and annoy shippers, these common law remedies

were not followed and common law relief was not secured.

The result was that great abuses grew up and existed at the time of the adoption of the original Commerce Act. It was because of these abuses and these wrongs and the inadequacy of the remedies that the Commerce Act was adopted.

For some unaccountable reason, however, Congress did not see fit to condemn all violations of the common law. Congress legalized certain discriminations, inequalities and injustices.

The carriers were able to persuade legislators that when circumstances and conditions were dissimilar that discriminations could be made and practiced without shippers being entitled to any relief on account thereof. This resulted in the adoption of the original fourth section. These persuasions also resulted in the qualification of other provisions of the common law whereby preferences and discriminations which were apparent and existed had to be "undue" before they became within the condemnation of the statute law.

Each time the law has been amended it was with a view and for the purpose of eliminating

and discarding some of the injustices, discriminations or preferences which the law thereto countenanced or legalized.

The provision of the first section that all rates must be reasonable was and is simply declaratory of the common law.

23 *Ency, of Law* (2nd Ed.), 656.
Munn vs. Illinois, 94 U. S. 113.
Ruggles vs. Illinois, 108 U. S., 538; 2 S. C. R. 836.
Atchison, etc., Co. vs. Denver, etc., 110 U. S. 667; 4 S. C. R. 188.
Stone vs. Farmers' etc., Co. 116 U. S. 331; 6 S. C. R. 345.
Dow vs. Beidelman, 125 U. S. 680; 8 S. C. R. 1028.

Common carriers assume the duties of a public trust. By engaging in the business they grant to the public an interest in their business. They agree that all persons interested in their business through such grant shall be treated and dealt with fairly, equitably, justly and without favor, disadvantage or discrimination.

Munn vs. Illinois, 94 U. S. 113.
Chicago, etc., Co. vs. State of Minnesota, 134 U. S. 418; 10 S. C. R. 462.
Budd vs. People, 143 U. S. 517; 12 S. C. R. 468.
Brass vs. State, 153 U. S. 391; 14 S. C. R. 857.

Covington, etc., vs. Sandford, 164 U. S. 578; 17 S. C. R. 204.
Mo. Pac. Ry. Co. vs. Labaree, etc., Co., 211 U. S. 612; 29 S. C. R. 214.

The legislative department can directly or through a commission fix the rates of carriers, and this power is without limitation, except that confiscation of the property of the carriers must not result from the rates so fixed.

Congress has not yet decided or determined what the earnings of carriers must be so that the courts can determine definitely what is confiscation. The constitution does not say what carriers may earn nor the minimum which must be earned before confiscation will result.

In the California water cases and the New York Gas case this court has affirmed decisions of the appropriate tribunals, which permit public service corporations to earn only six per cent.

San Diego Land & Town Co. vs. National City, 174 U. S. 756; 19 S. C. R. 804, 811.
San Diego Land & Town Co. vs. Jasper, 189 U. S. 439; 23 S. C. R. 572.
Stanislaus County vs. San Joaquin, etc., Co., 192 U. S. 201; 24 S. C. R. 246, 247.
New York Gas Company Case, 212 U. S. 19; 29 S. C. R. 192.

There is no reason why Congress should not fix a lower per cent than six.

> "*It is proper to say that if the answer had not alleged in substance that the tolls prescribed by the Act of* 1890 *were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than* 4 *per cent. on its capital stock. It cannot be said that a corporation, operating a public highway, is entitled as of right, and without reference to the interest of the public, to realize a given per cent, upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation operating the road should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stock-*

holders may earn dividends. The legislature has the authority, in every case where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public.........*....*....Justice to the public and to stockholders may require, in respect of one road, rates different from those prescribed for other roads. Rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road."*

Covington & L. Turnpike Road v. Sandford, 164 U. S. 578, 17 S. C. R., 198, 205, 206.

"BUT IT SHOULD ALSO BE REMEMBERED THAT THE JUDICIARY OUGHT NOT TO INTERFERE WITH THE COLLECTION OF RATES ESTABLISHED UNDER LEGISLATIVE SANCTION,UNLESS THEY ARE SO PLAINLY AND PALPABLY UNREASONABLE AS TO MAKE THEIR ENFORCEMENT EQUIVALENT TO THE TAKING OF PROPERTY FOR PUBLIC USE WITHOUT SUCH COMPENSATION AS, UNDER ALL THE CIRCUMSTANCES, IS JUST BOTH TO THE OWNER AND TO THE PUBLIC; THAT IS,

JUDICIAL INTERFERENCE SHOULD NEVER OCCUR, UNLESS THE CASE PRESENTS CLEARLY AND BEYOND ALL DOUBT SUCH A FLAGRANT ATTACK UPON THE RIGHTS OF PROPERTY, UNDER THE GUISE OF REGULATIONS, AS TO COMPEL THE COURT TO SAY THAT THE RATES PRESCRIBED WILL NECESSARILY HAVE THE EFFECT TO DENY JUST COMPENSATION FOR PRIVATE PROPERTY TAKEN FOR THE PUBLIC USE."

San Diego Land & Town Co. v. City of National City, 174 U. S. 739, 19 S. C. R. 804, 810.

"BUT IT IS WELL SETTLED THAT THE COURTS ALWAYS PRESUME THAT THE LEGISLATURE ACTS ADVISEDLY AND WITH FULL KNOWLEDGE OF THE SITUATION. SUCH KNOWLEDGE CAN BE ACQUIRED IN OTHER WAYS THAN BY THE FORMAL INVESTIGATION OF A COMMITTEE, AND COURTS CANNOT INQUIRE HOW THE LEGISLATURE OBTAINED ITS KNOWLEDGE THEY MUST ACCEPT ITS ACTION AS THAT OF A BODY HAVING FULL POWER TO ACT, AND ONLY ACTING WHEN IT HAS ACQUIRED SUFFICIENT INFORMATION TO JUSTIFY ITS ACTION."

Chesapeake & P. Telephone Co. v. Manning, 186 U. S. 238, 22 S. C. R. 881, 884.

It must be borne in mind that the carriers are asking that they be exempted from a statute

and a policy and a rule of law which has been adopted by Congress, and it is incumbent upon the carriers, therefore, to show that the law authorizes such exemption, and also that there is some definite method fixed whereby the facts can be determined and the rule of law applied to those facts. If there is no given state of facts provided for, then no exemption can be allowed.

It must be borne in mind that the carriers are undertaking to take advantage of a proviso to a section of the Commerce Act.

> The general rule of law is that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it. Schlemmer v. Buffalo, etc., Co., 205 U. S. 1, 10, 27, S. C. R. 407-8.

Provisos are generally for the purpose of making an exception, to restrain generalities, to qualify operation and prevent misinterpretation. They may be for the purpose of enlargement or extension. They may mean the same as "but" or "and," and serve to separate or diminish.

> *Interstate Commerce Commission vs. Baird*, 194 U. S. 25, 36-7; 24 S. C. R. 563.

See also:

> *Chesapeake & P. Telephone Co. vs. Manning*, 186 U. S. 238, 242; 22 S. C. R. 881.

The proviso in the statute proves that the thing attempted to be excepted would be within the general class, had the proviso or exception not been made.

Brown vs. Maryland, 12 Wheat. 419, 438.

A proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms, where the enacting clause is general in its language and abjects, and objects, and the proviso follows.

United States vs. Dickson, 15 Peters 141.

Rates may be fixed so as to require the carrier to furnish rates to all on basis carrier establishes to as some.

Alabama and Ry. Co. vs. Mississippi R. R. Comm., 203 U. S. 496; 27 S. C. R. 163.

Statutes that are constitutional in part only, will be upheld so far as they are not in conflict with the constitution, provided the allowed and prohibited parts are severable. Packet Co. v. Keokuk, 95 U. S. 89.

This rule is reasserted in Pusser v. Illinois, 116 U. S. 263. See:

Gatewood vs. North Carolina, 203 U. S. 531, 542; 27 S. C. R. 167.
Hamilton vs. Brown, 161 U. S. 256, 274; 16 S. C. R. 585.

The transcontinental carriers from St. Paul to Spokane which are defendants in the case before the commission have been earning and paying 7 per cent dividends and also expending almost unlimited earnings in betterments and permanent improvements and at the same time accumulating an almost incomprehensible surplus.

The carriers have been expending annually from earnings much more in permanent improvements than they are entitled to under the holding and rule announced by this court.

Ill. Cent. vs. I. C. C., 206 U. S. 441; 27 S. C. R. 700.

The power of Congress is supreme and absolute—barring the constitutional question of confiscation—as shown by numerous decisions of this court. Some of the cases are:
Safety Appliances:

Delk vs. St. Louis & R. Co., 220 U. S. 580; 31 S. C. R. 617.
Johnson vs. So. P. R. Co., 196 U. S. 1; 25 S. C. R. 158.

Fellow Servant Act. Safety Appliances:

Howard vs. Ill. Cent., 207 U. S. 463; 28 S. C. R. 141.

Distribution of Cars:

I. C. C. vs. Chicago & A. R. Co., 215 U. S. 479; 30 S. C. R. 163.
I. C. C. vs. Ill. Cent. R. Co., 215 U. S. 452; 30 S. C. R. 155.

Penalty for Failure to Adjust Damages:

Leathe vs. Thomas, 207 U. S. 93; 28 S. C. R. 30.

Ownership of Stock in Mining Company:

U. S. vs. Lehigh Valley R. Co., 220 U. S. 257; 31 S. C. R. 387.

Creating Liability of Initial Carrier:

Atlantic R. Co. vs. Riverside Mills, 219 U. S. 186; 31 S. C. R. 164.

Contracts Contravening Commerce Act:

Chicago, B. & Q. R. Co. vs. McGuire, 219 U. S. 549; 31 S. C. R. 260.
Chicago, I. & G. R. Co. vs. U. S., 219 U. S. 486; 31 S. C. R. 272.

Penalizing Carrier for Failure to Settle Claims Within Given Time:

Atlantic R. Co. vs. Mazursky, 216 U. S. 122; 30 S. C. R. 378.

Fixing Equal and Relative Rates:

Alabama, etc., Co. vs. R. R. Com. of Miss., 203 U. S. 496; 27 S. C. R. 163.

Can Prevent Carriage of Goods Owned by Carrier:

U. S. vs. Delaware R. Co., 213 U. S. 366; 29 S. C. R. 527.

From the decisions of this court in the cases hereinbefore mentioned and cited, it follows that an absolute long and short haul clause can be passed and adopted by Congress, if the application of that long and short haul clause does not result in the confiscation of the property of the carrier.

Instead of originally adopting or passing such a law or section, Congress did quite the contrary thing, and according to the decisions of this court, passed a law saying that the fourth section of the long and short haul clause should have no application whatever, if the circumstances and conditions were dissimilar at the two points to be compared with each other.

This court placed certain constructions on the original fourth section and Congress with full knowledge and notice of that construction by this court, undertook to do what it had a right to do as a court of appeal and final resort, namely, to amend that statute and section in such a way as to render the decisions theretofore promulgated by this court inapplicable to the amended section and place upon the statute

books a new law and thereby inaugurate a new policy.

Congress had full knowledge of the holdings of the Commission in these intermountain cases. Congress knew the Commission refused to consider coast rates in fixing interior rates prior to the 1910 amendment. Congress knew the Commission felt compelled by the decisions to eliminate entirely coast rates when considering interior rates in their reports prior to the 1910 amendment of the fourth section.

The Commission held:

> WE HAVE, HOWEVER, UPON FULL CONSIDERATION, HELD THAT UNDER THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, THE SEATTLE RATE CANNOT BE MADE THE MEASURE OF THE SPOKANE RATE; THAT OUR ONLY POWER IS TO ESTABLISH RATES TO SPOKANE WHICH ARE JUST AND REASONABLE UNDER ALL THE CIRCUMSTANCES, AND TO THIS RULING WE MUST ADHERE.
>
> * * * * * *
>
> IN FIXING THESE RATES WE HAVE PROCEEDED UPON THE VIEW THAT, UNDER THE PRESENT DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, WE COULD NOT USE THE RATE TO SEATTLE AS A STAND-

ARD BY WHICH TO MEASURE THAT TO SPOKANE. IF THIS WERE OTHERWISE, IF WE WERE FREE TO TAKE INTO ACCOUNT ALL THE COMPETITIVE CONDITIONS EXISTING BOTH EAST AND WEST AND TO DETERMINE WHAT, IN THE LIGHT OF ALL THESE CONDITIONS, WOULD BE A JUST AND REASONABLE RELATION BETWEEN THE RATES OF SEATTLE AND SPOKANE, A SOMEWHAT DIFFERENT QUESTION WOULD BE PRESENTED.

The people, through their representatives in Congress, so long as they are within the provisions of the Federal Constitution, are superior and paramount to the Commission and this court and have a right through their representatives in Congress to adopt a new or change a policy and to amend the law so as to eliminate and get away from the decisions of the Commission and this court.

Louisville & N. R. Co. vs. Mottley, 219 U. S. 467; 31 S. C. R. 266, 269.

In that case this court said:

> "The power granted to Congress to regulate commerce among the states and with foreign nations is complete in itself, and is unrestricted except by the limitations upon its authority to be found in the Constitution."

* * * * * *

"That Congress had the constitutional power to adopt such a policy and to prescribe appropriate means to give it effect, we do not doubt." * * *

"The court cannot add an exception based on equitable grounds when Congress forbore to make such an exception."

The policy of a statute is wholly for and with Congress.

G. & N. R. Co. vs. Mottley, 219, U. S. 467, 31 S. C. R. 269.
Colder vs. Michigan, 218 U. S. 591, 31 S. C. R. 123.
I. C. C. vs. Ill. Cent. 215, U. S. 452, 30 S. C. R. 155, 162-3.

Courts may consider reports of committees and debates in Congress. This court, however, has determined that they are not determinative or decisive of the construction placed upon any act by Congress or to be placed thereon by the courts. The court has given its reasons for so holding.

Aldridge vs. Williams, 3 How. 1, 15 Curtiss 268.
District of Columbia vs. Washington Market Co., 108 U. S., 243, 2 S. C. R. 543.
U. S. vs. Trans-Missouri Freight Association, 166 U. S. 290, 17 S. C. R. 540, 550.
Dunlap vs. U. S., 173 U. S., 65, 19 S. C. R. 319.
Maxwell vs. Dow, 176 U. S., 581, 20 S. C. R. 448, 449.

Oceanic Steam Navigation Co. vs. Stranahan, 214 U. S., 320, 29 S. C. R. 671.

This court held in the Trans-Missouri Freight Association case:

> "Looking simply at the history of the bill from the time it was introduced in the senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act. It cannot be said that a majority of both houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.
>
> There is, too, a general acquiescence in the doctrine that debates in congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. U. S. v. Union Pacific R. Co., 91 U. S. 72, at page 79; Aldridge v. Williams, 3 How. 9, 24.
>
> "The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other; *the result being that the only proper way to con-*

strue a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

Necessarily in considering a statute the history of that statute, matters to be remedied and the intention of Congress must be considered. If there be nothing to remedy, then there is no excuse for the amendment.

Preston vs. Browder, 1 Wheat. 115; 3 Curtiss 485.
Stewart vs. Kahn, 11 Wall. 493.
Blake vs. National Banks, 23 Wallace, 307.
U. S. vs. Union Pacific R. R. Co., 91 U. S. 72.
Platt vs. Union Pacific R. R. Co., 99 U. S. 48.
Rector, etc., of Holy Trinity Church vs. U. S., 143 U. S. 457; 12 S. C. R. 511.
Texas & P. Ry. vs. I. C. C., 162 U. S. 197; 16 S. C. R. 666.
U. S. vs. Goldenberg, 168 U. S. 95; 18 S. C. R. 3.

A guide to the meaning of the statute is found in the evil which it is designed to remedy, as gathered from contemporaneous events, the situation as it existed and as it was pressed upon the attention of the legislative body.

Rector, etc., of Church of Holy Trinity vs. U. S., 143 U. S. 457; 12 S. C. R. 511.

Surely the evil to be remedied was the charg-

ing of less for the longer haul than for the shorter haul. That was the situation as it existed. Those were the things that were pressed upon the attention of the legislative body.

Congress intended to and did adopt the policy of preventing carriers from charging more for the shorter haul. Where a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe.

Hobbs vs. McLean, 117 U. S. 567; 6 S. C. R. 870, 876.

The courts cannot insert words that are left out by the legislature.

Where the legislature makes a plain provision without making any exception, the courts can make none.

Maxwell vs. Moore, 22 Howard 185, 191.

The omission or failure to provide for contingencies which it may seem wise to have specifically provided for does not justify judicial addition to the language of the statute.

Pirie vs. Chicago Title & Trust Co., 182 U. S. 438; 21 S. C. R. 906, 912.

The amendment of the fourth section—the

long and short haul clause—is an absolute one with one qualification provided by implication, that is, the Commission may suspend the operation of the fourth section when its enforcement would confiscate property of the carriers. Except for this limitation and qualification, the fourth section as amended is an absolute long and short haul clause section.

Under the recent holdings of this court the delegation of this power and authority to the Commission is not a delegation of legislative power. The provision is not for that reason void.

U. S. vs. Grimaud, 220 U. S. 506; 31 S. C. R. 480.
Light vs. U. S., 220 U. S. 523; 31 S. C. R. 485.
Montezuma Canal vs. Smithville Canal, 218 U. S. 371; 31 S. C. R. 67, 73.

Findings of facts by the Commission are binding upon the courts.

I. C. C. vs. D. S. & W. R. Co., 220 U. S. 235; 31 S. C. R. 392.

The findings of the Commission are to the effect that confiscation will not result from an application of the long and short haul clause, or by refusal to suspend same.

I. C .C vs. C., R. I. & P. R. C., 218 U. S. 88; 30 S. C. R. 659.
I. C. C. vs. I. C. R. Co., 215 U. S. 452; 30 S. C. R. 155.
I. C. R. Co. vs. I. C. C., 206 U. S. 454; 27 S. C. R. 700.

Congress has determined and made a finding of fact and adopted the policy to the effect that it is no longer legal or lawful to charge more for a shorter than for a longer haul, if confiscation does not result.

This finding and determination by Congress is subject, of course, to the constitutional limitation, namely, that property cannot be taken without due process of law, and Congress therefore attached to the long and short haul clause the proviso that the same may be suspended by the Interstate Commerce Commission.

This suspension can only take place as a matter of course whenever there is some constitutional provision with which it comes in conflict.

The only other theory that can possibly be adopted by this court is that there are other provisions of the Commerce Act which furnish a standard or rule for the government and guide of the Commission. There are but two other things that can possibly guide the Com-

mission. One is the common law affirmed by the first section which provides that all rates must be reasonable and all unjust and unreasonable rates are unlawful. The other is discrimination between localities, or shippers which are prohibited by other provisions of the Commerce Act.

Congress did not amend the discrimination feature of the Commerce Act other than by implication in the amendment of the long and short haul clause. By implication the discrimination portions of the Commerce Act have been amended in the adoption of the amended fourth section.

The amended fourth section clearly implies that no discrimination must be permitted unless the constitutional prohibition of confiscation comes in conflict with the amended fourth section.

In order to wipe out discrimination it is necessary that relative rates be fixed and enforced. Congress has ample power to fix relative rates and this it may do either directly or indirectly through the Commission.

Albany, etc. vs. Railroad Commission of Mississippi, 203 U. S. 496; 27 S. C. R. 163.

As to whether or not a discrimination exists is a question of fact for determination by the Commission and the determination of that question of fact is such that it cannot be reviewed by the courts.

Shepley vs. Cowan, 91 U. S. 330.
U. S. vs. Throckmorton, 98 U. S. 61.
Vance vs. Burbank, 101 U. S. 514.
Marquez vs. Frisbie, 101 U. S. 473.
Lee vs. Johnson, 116 U. S. 48; 6 S. C. R. 249.
Sanford vs. Sanford, 139 U. S. 642; 11 S. C. R. 666.
Gonzales vs. French, 164 U. S. 338; 17 S. C. R. 102.
Brown vs. Hitchcock, 173 U. S. 473; 19 S. C. R. 485.
Gardner vs. Bonestell, 180 U. S. 362; 21 S. C. R. 399.
Brown vs. Gurney, 201 U. S. 184; 26 S. C. R. 509.
Hill vs. McCord, 195 U. S. 394; 25 S. C. R. 96.
U. S. vs. Minor, 114 U. S. 233; 5 S. C. R. 836.
Small vs. Rakestraw, 196 U. S. 403; 25 S. C. R. 285.

Congress has provided that no greater charge shall be made for the shorter than the longer haul except for a period of six months, within which time applications for relief may be made by the carriers, and for such additional time as may intervene between the making of the application and a hearing thereon.

Applications were made by the carriers for relief under the proviso of the amended fourth section and those applications have been heard and orders made thereon. The carriers therefore are not entitled to as great relief as the Commission granted them. The burden was and is upon the carriers to show such a state of facts as entitle them to relief under the amended fourth section. Upon these questions the findings of fact of the Commission are that the burden of proof has not been sustained by the carriers and they have not succeeded in convincing the Commission that they are entitled to the relief asked. Their failure in this respect is like unto a failure of any other litigant. Litigants are only entitled to relief to the extent that they prove facts satisfactory to the determining body. The carriers never attempted to prove confiscation. In the absence of convincing proof of confiscation, the carriers were not and are not entitled to any relief.

These appellants urgently insist that the Interstate Commerce Commission have granted the carriers more relief than they are entitled to under the law. Under the findings of fact made by the Commission, carriers were not entitled to any relief whatever because they did not make any showing that the property of the carriers or any carrier would be confiscated by

the application of an absolute long and short haul clause.

The first opinion and report in the Spokane case shows that the net surplus of the Northern Pacific Railway and the Great Northern Railway Company after payment of interest on bond indebtedness, 7 per cent interest on stock and the annual expenditures of large sums from earnings in permanent improvements, much exceeds what the carriers would lose by the application of terminal rates, that is, the application of the long and short haul clause to interior points from all points

All the reports in the Spokane case in effect and fact hold there is no water competition west of the Buffalo-Pittsburg line; that the carriers pretend that they have made blanket rates from Missouri River points to the coast by reason of market competition.

There is no reason in the opinions or reports in any of the intermountain cases which justify the giving of low rates to Pacific coast terminals from points of shipment less than to Spokane, 400 miles shorter distance.

If interior points, Missouri River and east, are entitled to blanket rates to New York be-

cause of market competition then the same rule should apply to Spokane.

If Chicago is entitled to a rate because it competes with New York, then Spokane is entitled to the same rate as coast points because Spokane competes with coast points.

If the carriers are permitted to continue their determination as to what shall justify them in making a blanket rate or a competitive market rate, they can control absolutely the entire commerce of the country. They can make or break any city or community. They can commit under the guise of market competition or some other pretext any kind of a discrimination that fertile brains can devise.

The evident object and purpose of the Commerce Act is to give every community a fair show, a decent chance, like privileges, similar opportunities and relative rates.

If these are not the objects and purposes of the Commerce Act, then the carriers can continue without let or hindrance in all conceivable iniquities, unjust practices, rank discriminations to the extent that the caprice of traffic men may determine.

Interveners earnestly urge that the Interstate Commerce Commission should have complied

with the amended fourth section absolutely and refused to suspend the same or grant any relief to the carriers thereunder because no showing was made that to so do would result in the confiscation of the property of carriers or any carrier.

The findings of fact made by the Commission before the fourth section was amended are sufficient to warrant the Commission in granting and giving to Spokane (under the unamended fourth section) the same rates as Pacific coast terminals have from any point between Missouri River and the Buffalo-Pittsburg line.

The facts as found by the Commission before the amendment of the fourth section are sufficient to warrant the Commission in granting and giving to Spokane (under the unamended fourth section) relative rates from all points west of the Buffalo-Pittsburg line. By relative rates is meant that Spokane and interior points should have better rates from Missouri River than the Pacific coast terminals, because of the 400 miles less distance and because west of Spokane there is the Cascade range of mountains, over which it is necessary to transport all freight moving by rail to Pacific coast terminals in the State of Washington. Under the original find-

ings of fact before the amendment of the fourth section, the Commission should have decided and determined that Spokane is entitled to better than Pacific coast terminal rates by reason of the shorter distance from all points of shipment not directly affected by water competition, to-wit: From all points west of Buffalo-Pittsburg line.

Interveners respectfully submit that the carriers are not entitled to an injunction herein; that the decision of this court should be such that will warrant and require the Commission to grant to the itermountain country the application of the long and short haul clause without any qualification.

Respectfully submitted,

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JOHN WILEY,
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Of Counsel.

Nos. 883, 925, 884, 920.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1913

UNITED STATES OF AMERICA

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND SIXTEEN OTHER RAILROAD COMPANIES.

UNITED STATES OF AMERICA

vs.

UNION PACIFIC RAILROAD COMPANY AND TEN OTHER RAILROAD COMPANIES.

INTERMOUNTAIN RATE CASES.

APPEALS FROM THE COMMERCE COURT.

BRIEF AND ARGUMENT ON BEHALF OF THE APPELLEES.

BARNARD & MILLER PRINT, CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1911.

UNITED STATES OF AMERICA *vs.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY and sixteen other railroad companies.	No. 883. No. 928.
UNITED STATES OF AMERICA *vs.* UNION PACIFIC RAILROAD COMPANY and ten other railroad companies.	No. 884. No. 929.

APPEALS FROM THE COMMERCE COURT.

BRIEF AND ARGUMENT ON BEHALF OF THE APPELLEES.

STATEMENT OF FACTS.

These are appeals by the Government from orders of the Commerce Court in the above numbered cases. In No. 883 the appeal is from a decree temporarily enjoining an order of the Interstate Commerce Commission made July 31, 1911; No. 928 is from a decree in the same

case making permanent the injunction. No. 884 is an appeal from a decree temporarily enjoining an order of the Interstate Commerce Commission made June 22, 1911; No. 929 is from a decree in the same case making permanent that injunction. The appeals involve the constitutionality and interpretation of the fourth section of the Interstate Commerce Act as amended June 18, 1910. For the purpose of distinguishing them, Nos. 883 and 928 will hereafter be referred to as the Fourth Section case; Nos. 884 and 929 as the Spokane case.

In the Fourth Section case the carriers sought to enjoin and set aside an order of the Interstate Commerce Commission entered upon their applications under the fourth section of the Interstate Commerce Act as amended June 18, 1910, for leave to charge from points in certain eastern defined territories of the United States to Pacific Coast terminal points rates lower than they concurrently charged for the transportation of like traffic between points in those territories and points lying between them and the Pacific Coast terminals. More accurately speaking, the applications of the carriers requested authority to continue the existing rate adjustment between the above points, such rates being lower between points in the eastern territory and the Pacific Coast terminals than the rates concurrently in effect from that territory to intermediate points. The complaining railway companies comprise the trans-continental lines, whose eastern termini are on the Missouri or the Mississippi River or at Chicago, and whose western termini are, either directly or through subsidiary or affiliated companies, on the Pacific Coast.

The railway companies serving the City of Spokane (all being parties to the Fourth Section case) sought to

enjoin and set aside an order of the Commission entered in a proceeding before the Commission on complaint of the City of Spokane and others alleging that the rates from eastern points to Spokane were unreasonable and discriminatory. The order purports to have been made pursuant to powers granted to the Commission by the fourth section as amended. It is identical in all respects with the order made in the Fourth Section case, except that the carriers are required to observe it for a period of not less than two years from November 15, 1911.

The circumstances which gave rise to these orders are as follows:

PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

August 30, 1906, the City of Spokane and others filed a complaint before the Commission against the railway companies in the Spokane case, alleging that the class rates and some thirty-four commodity rates to Spokane from eastern defined territories were unjust and unreasonable, as violative of Section 1 of the act; and unjustly discriminatory against Spokane and unduly preferential to the Pacific Coast, thus violating Sections 3 and 4 of the act. After a hearing, the Commission found that the rates did not violate Sections 3 or 4 (Vol. 15 I. C. C. Rep., p. 388), but did violate Section 1; and thereupon entered its order February 9, 1909 (Rec. 12, Case 884), prescribing just and reasonable class rates from St. Paul and Chicago to Spokane, which were in due course established by the carriers. The Commission did not prescribe rates for the 34 commodities because complainants evinced a desire to amend their complaint so as to cover all principal commodity rates.

June 19, 1909, complainants filed an amended complaint challenging approximately 600 commodity rates, alleging that they were in violation of Sections 1, 3 and 4 of the act. June 7, 1910, the Commission rendered its further opinion (Vol. 19 I. C. C. Rep., p. 162), holding said commodity rates to be unjust and unreasonable and in violation of section 1, and suggesting in lieu thereof rates deemed by it to be just and reasonable. It did not, however, order the carriers to establish the suggested rates, stating that it felt in view of the large reductions in revenue which would follow, it should be more accurately informed as to their extent before making a final order. Their findings, therefore, were not made, nor have they ever become, final. To secure this information the Commission required the carriers to ascertain and report what revenue they would have received under the suggested rates, had they been in force during specified months of the year 1910, and also to report the revenues actually received for the same months under existing rates. While the rates thus suggested were stated in detail, and without relation to the rates to Pacific Coast terminals then in effect, they were nevertheless with few exceptions the following percentages of the coast rates:

From Missouri River common points territory, 100 per cent.

From Mississippi River common points territory, 110 per cent.

From Chicago common points territory, 112½ per cent.

From Detroit common points territory, 118 per cent.

From Pittsburg common points territory, 125 per cent.

From New York common points territory, 135 per cent.

Within two weeks after the making of this report Congress amended the fourth section of the act by striking from the enacting clause the words, "under substantially similar circumstances and conditions," and by adding the following proviso:

> "That no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provision of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission."

Thereafter the Commission prescribed forms in which such applications should be made. These required that the applications should request authority to establish rates to the more distant points lower than rates concurrently in effect to intermediate points and that they should state the highest charge at any intermediate point and the excess thereof in cents per hundred pounds over the charge to the more distant point.

Because of the above amendment the carriers in order to maintain the existing adjustment of rates, were forced to apply, in the first instance, to the Commission, within the time allowed for relief from the operation of the rigid rule of the section. This they did, and pursuant to the amended fourth section and the requirements of the Commission asked leave to continue in effect from eastern defined territories to the Pacific Coast commodity rates, as shown by certain named tariffs, lower than the commodity rates concurrently in effect from the same territories to intermediate points, including Spokane. The reasons given were that the lower commodity rates

to the Pacific Coast terminals, were less than just and reasonable, and compelled (a) by the competition of water carriers operating between Atlantic and Pacific ports; (b) by competition of water carriers operating between ports of foreign nations and Pacific Coast ports; (c) by competition with Canadian rail carriers not subject to the act; (d) by competition between the products of Atlantic Coast points and the products of the Mississippi River valley territory; and (e) by competition between the carriers themselves at Pacific Coast terminals. These applications were heard by the Commission at the time when the reports of the carriers were submitted as to the effect of the rates proposed in the Spokane case.

These reports showed that the Northern Pacific Railway Company would have suffered an annual loss of $604,000, and that the Great Northern Railway Company would have suffered an annual loss of approximately $640,000 if the rates suggested by the Commission in their report of June 7, 1910, should have been made effective.

The Commission disposed of the applications by the following order:

ORDER.

At a General Session of the Interstate Commerce Commission, held at its Office in Washington, D. C., on the 31st day of July, A. D. 1911.

PRESENT:

Judson C. Clements,
Charles A. Prouty,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Charles C. McChord,
Balthasar H. Meyer,
} Commissioners.

FOURTH SECTION ORDER NO. 124.

In the Matter of the Applications, Nos. 205, 342, 343, 344, 349, 350 and 352, on behalf of the Transcontinental Freight Bureau, by R. H. Countiss, Agent, for relief from the provisions of the Fourth Section of the Act to Regulate Commerce as amended June 18, 1910, with respect to rates made from Eastern points of shipment which are higher to intermediate points than to Pacific Coast terminals.

COMMODITY RATES.

These applications, as above numbered, on behalf of the Transcontinental Freight Bureau, ask for authority to continue rates from Eastern points of shipment which are higher to intermediate points in Canada and in the States of Arizona, New Mexico, Idaho, California, Montana, Nevada, Oregon, Utah and Washington, and other states east thereof, than to Pacific Coast terminals.

Full investigation of the matters and things involved

in these petitions, in so far as they concern westbound commodity rates, having been had,

It is ordered, That for the purposes of the disposition of these applications, the United States shall be divided into five zones, as described in the following manner:

(The transcontinental groups hereinafter described are as specified in R. H. Countiss, Agent's, Transcontinental Tariff I. C. C. No. 929.)

Zone No. 1 comprises all that portion of the United States lying west of a line called Line No. 1, which extends in a general southerly direction from a point immediately east of Grand Portage, Minn.; thence southwesterly, along the northwestern shore of Lake Superior, to a point immediately east of Superior, Wis.; thence southerly, along the eastern boundary of Transcontinental Group F, to the intersection of the Arkansas and Oklahoma state line; thence along the west side of the Kansas City Southern Railway to the Gulf of Mexico.

Zone No. 2 embraces all territory in the United States lying east of Line No. 1 and west of a line called Line No. 2, which begins at the international boundary between the United States and Canada, immediately west of Cockburn Island, in Lake Huron; passes westerly through the Straits of Mackinaw; southerly, through Lake Michigan to its southern boundary; follows the west boundary of Transcontinental Group C to Paducah, Ky.; thence follows the east side of the Illinois Central Railroad to the southern boundary of Transcontinental Group C; thence follows the east boundary of Group C to the Gulf of Mexico.

Zone No. 3 embraces all territory in the United States lying east of Line No. 2 and north of the south boundary of

Transcontinental Group C, and on and west of Line No. 3, which is the Buffalo-Pittsburg line from Buffalo, N. Y., to Wheeling, W. Va., marking the western boundary of Trunk Line Freight Association territory; thence follows the Ohio River to Huntington, W. Va.

Zone No. 4 embraces all territory in the United States east of Line No. 3 and north of the south boundary of Transcontinental Group C.

Zone No. 5 embraces all territory south and east of Transcontinental Group C.

It is further ordered, (1) That those portions of the above numbered applications that request authority to maintain higher commodity rates from points in Zone No. 1 to intermediate points than to Pacific Coast terminals be, and the same are hereby, denied, effective November 15, 1911; (2) that petitioners herein be, and they are hereby, authorized to establish and maintain, effective November 15, 1911, commodity rates from all points in zones numbered 2, 3 and 4, as above defined, to points intermediate to Pacific Coast terminals that are higher to intermediate points than to Pacific Coast terminals; provided, that the rates to intermediate points from points in zones numbered 2, 3 and 4 shall not exceed the rates on the same commodities from the same points of origin to the Pacific Coast terminals by more than 7 per cent. from points in Zone No. 2, 15 per cent. from points in Zone No. 3, and 25 per cent. from points in Zone No. 4.

The Commission does not hereby approve any rates that may be established under this authority, all such rates being subject to complaint, investigation, and correction if they conflict with any other provisions of the act.

By the Commission:

JUDSON C. CLEMENTS,

[SEAL] *Chairman.*

The Commission, holding the rates in the Spokane case to be violative of the fourth section, disposed of the Spokane complaint by an order identical with the foregoing except that it required the carriers to observe it for a period of two years. This order did not require the carriers to establish the rates suggested in the report of June 7, 1910, and hence did not determine the issue raised by the Spokane complaint as to whether or not the rates complained of were in violation of Section 1 of the act, nor otherwise determine whether they were in violation of Section 3, and hence left unchanged the original conclusion that said rates were not in violation of that section.

It will be observed that if the fourth section order of the Commission be complied with by maintaining present rates to the Pacific Coast terminals and reducing intermediate rates, so that they shall bear to the terminal rates the relations therein fixed, the rates to Spokane must be less than the just and reasonable rates suggested by the Commission in their report of June 7, 1910, by the following percentages of the coast rates from the different zones:

From Missisipspi River common point territory, 2.8 per cent.

From Chicago common point territory, 5.1 per cent.

From Detroit common point territory, 2.6 per cent.

From Pittsburg common point territory, 8.7 per cent.

From New York common point territory, 8 per cent.

At the time the complaint in the Spokane case was pending before the Commission there were also pending before it a complaint of the Maricopa County Commer-

cial Club, complaining of commodity rates from eastern defined territories to various points in Arizona intermediate between said territory and Pacific Coast terminals, not only as being discriminatory because of the terminal rate but as being unjust and unreasonable in and of themselves, and a complaint by the Railroad Commission of Nevada raising like issues as to Nevada points. In these proceedings the Commission made no specific order, but disposed of the complaints by its fourth section order.

The facts on which the Commission acted are few and simple and are substantially set out in its reports. Whatever of confusion there may be arises from certain argumentative statements therein.

In 1869 the Central Pacific Railroad (now a part of the Southern Pacific) was built from San Francisco to Ogden, there connecting with the newly constructed Union Pacific Railroad, which, in turn, connected directly and indirectly with other lines extending to various points in the middle and eastern parts of the United States. Soon afterward the Southern Pacific Railroad was completed from San Francisco to El Paso, there connecting with lines controlled by it extending to New Orleans. Prior to that time all the carrying business to points on the Pacific coast was done by water lines. The first transcontinental route in order to transport freight by rail from the Atlantic to the Pacific Coast found it necessary to meet this water competition and was obliged to adjust its rates to this end. The competition became acute, at one time forcing the giving of rebates to shippers, and causing the Southern Pacific to put on a line of boats between New York and New Orleans, forming a through rail and water route known as the "Sunset Route," competing with the ocean carriers. In 1883 the Northern Pa-

cific Railroad was completed, the line extending from Lake Superior to Puget Sound. The Atchison, Topeka & Santa Fe Railroad was afterward completed from Kansas City to Los Angeles and San Diego and later acquired a line to San Francisco. Its old line in the East had extended to Chicago. In 1893 the Great Northern completed its line to cities on the coast. There were then formed a great number of trans-continental routes between the Atlantic and the Pacific Coast by combinations of various connecting lines. The Santa Fe Railroad in competing with the Sunset Route, in order to secure and move traffic from points on its line to the Pacific Coast, was forced to make the same low rates from Chicago and Missouri River points that were made by the Sunset route from New York. The rates which had been established by the Sunset Route and which were thus met by the Santa Fe road were forced by the competition of ocean carriers from the Atlantic to the Pacific Seaboard.

The Pacific coast cities had the advantage of ocean carriage,—received goods from different parts of the world. They were distributing markets, and any carrier doing a transportation business thereto from any point was obliged to adjust its rates so as to permit of competion with other localities, which, at the same time, were selling and shipping to the coast cities. It is shown by the findings of the Commission that the Santa Fe Railroad adjusted its rates to the coast from points on its own line so as to compete for transportation business not only as against ocean carriers from the Atlantic to the Pacific, but also as against carriers from other localities to the coast, including the various combinations of transcontinental lines or routes that might be formed, and even against the through route of which its particular line con-

stituted a part. The same was true with respect to other companies operating lines from the Missouri River or Mississippi River valleys to the Pacific Coast.

Mr. Commissioner Lane, in the opinion of the Commission on the applications of the carriers for relief under the Fourth Section, shows (21 I. C. C. R. 364) a movement westward of manufacturing industries from the Atlantic Seaboard; that this was the result of the competion of the Santa Fe and other lines beginning at the Mississippi River; that on traffic originating at Chicago, lines originating there and extending to the Pacific Coast would get all the revenue while on similar traffic from New York they would have to divide the earnings. He says:

> "The water competition of the seaboard has never been strong enough since 1887 to compel a reduction of rates from New York which the lines out of Chicago did not feel fully justified in meeting at that point."

He also shows that every article which can be supplied on the Atlantic Seaboard can be supplied in the Middle West.

On page 355 he states:

> "It is the admission of the carriers themselves that the rates which they make from Chicago to the Pacific Coast terminals are established in order that the manufacturers and the jobbers of the west may compete on a level with the jobbers and manufacturers who have the advantage of a location at the Atlantic Seaboard."

This adjustment he characterizes as "railroad policy" and as "market competition." He appears to proceed upon the theory that all the railroads of the United States are under a single management or control, operated as a unit, and belonging to a single interest. Yet

the facts found show that each of the different railway companies in making the respective adjustment of rates to the Pacific Coast terminals was governed by competitive factors.

On page 367, under the head of "Market Competition," he states:

> "Ocean competition, say the carriers, brings about the lower rates from coast to coast; market competition produces the lower rates from the interior to the coast."
>
> "'Market competition' is a phrase with which the railroad traffic manager too often conjures. When no other force can be found which brings about a discrimination, market competition is advanced. It is both a sword and a shield; it is used to protect the carrier against attack because of undue discrimination as between communities, and it is a weapon of offense as well, by which one carrier invades the territory of another upon a different basis from that which it grants to its own immediately dependent communities and forces concessions from its rival carriers."
>
> "Market competition, as we have seen, is a euphemism for railroad policy."

But an epithet or characterization cannot change the facts or the effect thereof. It tends, however, to mislead.

On the other hand, Mr. Commissioner Prouty, writing the unanimous opinion of the Commission on the fourth section applications and the complaint of the City of Spokane and the Salt Lake Bureau, says (21 I. C. C. R. 414):

> "Competition of carriers subject to the Act has always been a factor with us in determining whether a preference in favor of a given locality is due or undue, and that is substantially the question which must be answered in passing upon an application under the present fourth section."
>
> "Strictly speaking, there is no such thing as 'market competition' which is distinct from competition

between the lines of transportaton serving the market. A market can only compete through the agency which transports for it. The carrier makes a rate from a given market, not out of favor to that locality, but because it desires to obtain traffic which will not otherwise come to it. There would seem, therefore, to be little distinction between the competition of markets and the competition of rival railroads."

He further states (page 418):

"These rates to Pacific Coast terminals are made applicable not only from the Atlantic Seaboard where water competition exists, but from territory as far west as the Missouri River and even Colorado; that is, the same rate to Pacific Coast terminals is made from Colorado common points and all territory east, thus creating a blanket some 2,000 miles in width."

On page 420, he states:

"It is evident that traffic in New York can move the entire distance to San Francisco by water, and that therefore water competition may and does control the rate between those points. If, now, traffic is at some interior point, like Chicago, it can only take this water route by being carried from the interior point to New York by rail. The total cost of the carriage from the interior point to San Francisco would be made up of the cost to New York and that from New York. It would follow that as the distance from the Atlantic Coast increases the cost of carriage by water also increases and the direct effect of water competition decreases. If, therefore, rates were so adjusted as to simply meet and fully meet water competition the rail rate from New York to San Francisco would be lower than that from Chicago by the amount of the rate from Chicago to New York."

But on page 422, he says:

"It is true, however, that carriers maintain the same trans-continental rate from Chicago as from New York, not by reason of the direct effect, but

rather as an indirect result of water competition. The reason for this will be best understood by an actual illustration. Assume that a building requiring the use of a large amount of structural steel is to be erected in San Francisco. That steel is manufactured both at the seaboard and in Chicago. That which is made at the seaboard can be taken by water from the point of origin to the point of destination, and the rate at which it can move is therefore determined by water competition."

"The cost of producing steel is the same at both points. In order, therefore, that the producers may stand an equal chance in competing for this business it is necessary that the rate from both points should be the same, and the business can not move from Chicago unless the rate from that point is as low as from the seaboard."

"The Atchison, Topeka and Santa Fe Railway begins at Chicago. If this steel is bought at Chicago and moves by that line, the entire freight money is retained by it; if, upon the other hand, the steel is bought at New York, moved by some line to Chicago, and there delivered to the Santa Fe, that line only receives a part of the through charge. The service performed by it is the same in either case, but the amount of its compensation is larger when the freight originates at Chicago. It is therefore for the interest of that line to name a rate from Chicago which will originate the business at that point instead of allowing it to originate upon the seaboard. The interest of the line from New York to Chicago is that the business should be taken up at New York, and as a compromise it is finally agreed to apply the same rate from both these points. This clearly shows how water competition, if it does not actually extend to the interior point, may and does dictate the rate from that point."

"What would be true of the steel entering into the construction of this building is true also of almost every article of commerce which moves between the east and the west. The middle west today manufactures nearly everything which is produced upon

the Atlantic seaboard, and the effect of this policy of the railroads has been to make the middle west the almost exclusive market of origin for the intermountain country and largely for the Pacific Coast itself. This competition is strictly that of carriers, although sometimes termed 'market competition.''

On page 423, he says:

''Considering this question broadly and in all its aspects, we cannot say that the legitimate effect of water competition upon the Atlantic seaboard may not be to reduce the rail rate from interior points.''

That the Commission found that the trans-continental rail rates from the Atlantic to the Pacific are controlled by water competition and forced as low as they are by such competition is beyond dispute.

Mr. Commissioner Prouty says on page 416:

''The first inquiry is therefore whether water competition actually exists which has produced and does produce an effect upon rates from the Atlantic seaboard to the Pacific coast, from New York to San Francisco, treating these two cities as illustrative of the localities in which they stand.

''This question of fact has been often considered in the past, and with but one unvarying result. The circuit court of the United States has twice found, once in a proceeding concerning these very rates to Spokane, that active water competition does exist which controls the coast rate.''

On page 417, he continues:

''This Commission has repeatedly found and recognized the same fact.

''In the original hearing of the Spokane case we re-examined that whole question and reaffirmed our decision.

''In the recent hearing upon the applications of trans-continental lines for leave to disregard the rule of the fourth section evidence has again been pro-

duced upon this subject which conclusively shows that the previous finding of the Commission is right.

"These actual transactions prove more conclusively than any mere statement that almost every article which is the subject of ordinary commerce between the coasts can and does move from New York to San Francisco by water at rates materially lower than those maintained by the defendants by rail. We have used San Francisco as the destination port upon the Pacific coast, and in some instances rates from New York to San Francisco are a trifle lower than to other coast cities, but, generally speaking, the San Francisco rate is maintained at Los Angeles, Portland, Seattle, Tacoma and other points upon the coast.

"Passing for the time being the extent and effect of this competition at interior points it must be found as a fact that there is real and active water competition between New York and San Francisco, between the Atlantic and the Pacific coasts, which does limit the rate of transportation which can be charged by rail between those points upon nearly every article which moves by rail."

On page 418, he continues:

"It is said that the amount of the movement by water is so insignificant that it should be disregarded. The amount is not insignificant. If reference be had to the traffic which actually originates upon the Atlantic seaboard a considerable percentage moves by water, but the significant thing is not the amount of the movement, but the ever-present possibility of that movement.

"So here the ocean is ever present. The possibility of using it as an avenue of transportation is ever open, and the fact that it will be used, if for any considerable length of time the defendants maintain rates which are so high, or so adjusted as to render it profitable for shippers to resort to that means of transportation, is never doubtful.

"The carriers have met this competitive situation by establishing from the Atlantic Seaboard to Pa-

cific coast ports a series of commodity rates. Their class rates may be disregarded, since no traffic actually moves under them, the business being handled under some 1300 commodity items, said to be so adjusted as to best meet this water competitive situation."

On page 421, he says:

"Competition at the present time seems to be more active. An independent line has been established upon the Pacific coast. The Panama Railroad has become an actual competitor for this business. The American-Hawaiian line, finding competitors in the field, has been compelled to reduce its charges."

On page 422, he says:

"Everything indicates that the effect of this water competition will increase rather than diminish from now until the completion of the Panama Canal and when that waterway is open for business both rate and facility will be very much better than today."

Notwithstanding it was found and stated in so many words that the rail rates from the Atlantic Seaboard to Pacific Coast terminals were adjusted to compete with water lines, and that the same rate was necessarily made by different lines and combinations of lines operating from various points between the Atlantic Seaboard and the Missouri River as a competitive matter, and so that such lines and combinations of lines might secure and move freight to the Pacific coast terminals, the Commission concluded that because the carriage by the water carriers was only between points on the Atlantic Seaboard and the Pacific coast terminals, and was not from points inland from the Atlantic Ocean, therefore the applications should be denied, except from zones 2, 3 and 4, as defined by it, but that from these zones the carriers might maintain certain arbitrary differentials.

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Thus, on page 425, Mr. Commissioner Prouty says:

> "Looking at this whole situation and endeavoring to justly consider the interests of all parties affected, including the carriers, we are of the opinion that from zone 1 no higher charge can justly be made at any intermediate point than to a more distant point. The eastern limit of this territory is approximately 1500 miles from the Atlantic seaboard, almost midway between the Pacific and Atlantic oceans. No traffic has ever been, and none probably ever will be transported from this section to the Atlantic coast and thence by water to the Pacific coast. Giving full weight to the effect of competition of all kinds, we can find no justification for a system of rates which maintains from this territory a higher charge to any interior point than is made to the coast."

Here it is apparent the Commission entirely overlooked competition which it found to exist between the middle western lines and all other lines forming various transcontinental routes as well as that of water carriers from various localities to the Pacific coast terminals.

So, in treating of Zone 2 it seemed to regard as important only the inquiry whether traffic would move from that territory to the Pacific coast by way of the Atlantic seaboard. The same is true in respect to its treatment of Zones 3 and 4.

Mr. Commissioner Lane says (page 369) that if the coast cities avail themselves fully of the ocean and develop industries on the coast they will compete with industries of the East for the interior trade. This would be a limitation and discouragement of rail competition against the water carriers, calling for a decrease or abandonment of terminal traffic by rail carriers.

It is apparent that in disposing of the applications the Commission imposed an unjust and unlawful burden upon

the carriers by requiring them to establish to the satisfaction of the Commission not merely that the coast cities were not given an undue preference or unjust advantage over the intermountain towns, but that the intermediate rates, which would mean all the intermediate rates, involving a vast number from numerous places, were reasonable in and of themselves.

Thus, on page 368, Mr. Commissioner Lane states:

> "We must regard the proviso in the fourth section as subordinate to the preceding clause prohibiting the higher rate for the shorter haul, and to carry out this intent of the law a carrier must establish before this Commission, in order to secure an order of exception thereunder, more than merely its own desire to haul a great volume of traffic between two distant points; it must prove that by such a policy it will not impose unreasonable rates upon any intermediate point, and that its policy will not work an injustice of which such intermediate point may fairly complain. Unless it does make such proof this Commission is not justified under the law in excusing it from adopting its rates to the more distant point as the basis for rates to the near points."

On page 369 he states:

> "The carriers herein involved have not shown that undue discrimination was not effected by their rate adjustment between points in Nevada and points in California, nor have they established that the rates to the coast cities, if extended by them from eastern points outside the zone of water influence, are not fully compensatory."

By this ruling the Commission ignored the presumption which attaches from the existing adjustment of rates in favor of its lawfulness, and imposed upon the carriers a condition practically impossible to meet,—namely, that of establishing to the satisfaction of the Commission that all the rates from all the points involved to all the inter-

mountain localities were just and reasonable in and of themselves.

In fixing the relation which the rates from the various localities should bear to the rates from the same zones to the Pacific coast terminals it is evident that the Commission did not find that the intermediate rates were unreasonably high in and of themselves, because the present intermediate rates might be maintained if the carriers should advance their rates to the Pacific coast terminals, though, of course, the result would be that they would sacrifice that business. The Commission evidently decided in the affirmative the query propounded by Mr. Commissioner Prouty on page 404: "Can the Commission under that section make an order in one or both of these cases which will obviate the necessity of prescribing a schedule of reasonable rates?"

October 4, 1911, the complainants filed in the Commerce Court the two petitions here under review, asking that the Commission's orders be enjoined and set aside.

PROCEEDINGS IN THE COMMERCE COURT.

The first three paragraphs in both petitions describe complainants and their lines and connections, complainants in the Fourth Section petition being those forming the nine trans-continental systems. The complainants in the Spokane case are those serving Spokane.

Paragraph four in each petition alleges that the carriers had found it necessary to classify freight into ten classes, numbered 1 to 5 and "A" to "E"; that all freight was so classified except bulky articles such as lumber, coal and grain. It is further alleged in the petition that these classes bear a given relation to each other and that

it is only when required by exceptional circumstances, such as the competition of water carriers, that individual commodities are taken out of their respective classes and given individual rates. The class rates in effect from Chicago, St. Paul and Omaha to Pacific coast points and from Chicago and St. Paul to Spokane in effect at the time of the commencement of the various proceedings before the Commission, are stated.

The following appears from paragraphs five to nine, inclusive, of the petitions and from the affidavits filed in support thereof:

The Union Pacific-Southern Pacific was the first of the trans-continental systems (complainants in the fourth section case) to reach the Pacific Ocean. It was completed to San Francisco in 1869. The last of said systems to reach the coast was the Chicago, Milwaukee & Puget Sound, completed in 1910. Prior to the completion of the Union Pacific-Southern Pacific to San Francisco, all traffic from the Atlantic coast to Pacific coast points was carried either by clipper ship or steamship around Cape Horn or by steamship to the Isthmus of Panama, thence by rail across the Isthmus and thence by steamer to point of destination. Competition of water carriers and rail carriers for the Atlantic-Pacific coast traffic began with the completion of the Union Pacific-Southern Pacific System and has continued to this day, with the result that water competition instead of diminishing with the completion of each new trans-continental line has actually increased. The clipper ship around the Horn has given way to the steamship, and various lines ply between eastern Atlantic ports and eastern ports of the Isthmuses of Panama and Tehuantepec, there connecting with rail lines which in turn connect with other steamship lines ply-

ing between the Pacific coast ports of said Isthmuses and the Pacific Coast ports of the United States.

The trans-continental lines compete not only with the water carriers for the Atlantic coast-Pacific coast traffic but also with each other for the traffic moving to the Pacific coast terminals served by them respectively. All of said carriers form through routes with various connecting lines reaching all points in the eastern portion of the United States. It is shown that the through rates of the rail carriers from Atlantic coast to Pacific coast points are and at all times have been made in competion with and with reference to the rates charged by the all-water and water and rail lines between said points, the all-rail rates being a little higher than the water rates because of the more expeditious and satisfactory service afforded and the absence of marine insurance and of the water-transportation risk.

In the beginning the traffic moving to the Pacific coast terminals was such as was produced almost exclusively at Atlantic coast points. Later the Middle West in its development began to compete with the Atlantic coast territory in the production of the traffic required by Pacific coast territory. In order to compete in the markets of the Pacific coast the producers of the Middle West demanded and required rates to those terminals as favorable as those available to the Atlantic coast producers. It was and is to the interest of the trans-continental lines that the manufacturers, jobbers and producers in the Middle West of the things required by the Pacific coast territory be permitted to compete with the eastern manufacturers, jobbers and producers in the Pacific coast markets, for the reason that since these manufacturers, jobbers and producers are located at the eastern

termini of the transcontinental lines, those lines get the entire revenue derived from their traffic, whereas if traffic to the Pacific coast moves from Atlantic coast territory the revenue derived from it must be shared with their eastern connections. The desire of the manufacturers, jobbers and producers of the Middle West to compete in Pacific coast markets with those of the Atlantic coast and the desire of the carriers to have the traffic move from Middle West territory resulted in the establishment of the same rates from that territory as from the Atlantic coast. In other words, the low all rail water compelled rates from the Atlantic coast to the Pacific coast terminals were blanketed over that portion of the United States lying east of the Missouri River, and in some cases extended as far west as Colorado. The rates to the Pacific coast from the blanketed territory were lower than rates from the same territory to inland points intermediate to Pacific coast ports. The competition at the Pacific coast is felt at points inland from that coast in the inverse ratio to the distance from it. Rail rates from the blanketed territory to the inland, or inter-mountain, points, of which Phoenix on the Santa Fe, Reno on the Southern Pacific, and Salt Lake City on the Union Pacific and Southern Pacific, and Spokane on the Northern Pacific and Great Northern, are examples, were maintained by the carriers at what they deemed just and reasonable compensation for the service performed, except in so far as required to be less than this because of the proximity of some of these places to the Pacific coast enabling them to get their traffic by means of water lines through the terminals.

Paragraphs ten to twelve, inclusive, in the fourth sec-

tion petition (Rec., pp. 12-29, in case 883) describe the proceedings before the Commission in the Spokane case, as hereinbefore set forth, and in similar complaints, concurrently pending, filed by various inter-mountain points on the Atchison, Topeka & Santa Fe Railway and the Union Pacific and Southern Pacific railroads, wherein rates were challenged in the manner they were challenged in the Spokane proceeding.

Paragraphs thirteen and fourteen of this petition and twelve to thirteen of the Spokane petition (Rec., pp. 23-24, Case 884) allege the amendment of the fourth section, applications made pursuant thereto, and set forth the orders of the Commission in the fourth section case and in the Spokane case, all as hereinbefore stated under the heading of Proceedings before the Commission.

In paragraphs sixteen, seventeen, eighteen and nineteen (Rec., pp. 27-30, in Case 884) it is alleged that the carriers' rates now obtaining from the eastern defined territories to Spokane and other intermediate points involved, are just and reasonable; that the rates to the Pacific coast terminals from eastern defined territories are compelled by reason of the competitive conditions heretofore set forth; that the carriers cannot comply with the orders of the Commission sought to be set aside in the two petitions without either increasing their rates to the terminals or reducing their rates to Spokane and other intermediate points. To pursue the former course forces the carriers to withdraw from competition for traffic moving to the coast, to the great loss and detriment of the carriers, and, as well, of the coast terminals, in that it deprives them of the competition between the water carriers and the rail carriers serving them, to which competition they are justly en-

titled; to pursue the latter forces the carriers to accept for their service rates less than just and reasonable. The denial of the right to make any rates from Missouri River territory and territory west thereof to the Pacific coast terminals lower than rates concurrently in effect from points in such territory to any intermediate point prevents the products of the Missouri River territory from competing in the Pacific coast markets, and thus deprives the carriers of the right to carry such products in competition with like products reaching the coast by other routes. In the entry of its orders the Commission wholly failed, as appears from its opinions, to recognize the forces of rail or market competition and the rights of the carriers to take such into consideration in the establishment of rates. Because of the effects above shown of a compliance with these orders they deprive the carriers of their property without due process of law, and, are beyond the power of the Commission to make under the organic act creating it.

In support of their application for temporary injunction, the carriers filed various affidavits. Answers were interposed and counter affidavits filed, but subsequently the answers were withdrawn and the Government filed a motion to dismiss (Rec., pp. 329-330, in Case 883) and stood upon the same, thus admitting the facts stated in the petitions.

The following may be said to be the fundamental and controlling propositions of fact deducible from the allegations of the petitions and admitted by the motions to dismiss:

(*a*) The rail commodity rates from Atlantic coast points to Pacific coast points from a date shortly after

the completion of the first trans-continental line have been less than the rates concurrently in effect from Atlantic coast points to intermediate points, such as Maricopa, Reno, Salt Lake City and Spokane.

(*b*) During all this time the Atlantic coast-Pacific coast rail commodity rates have been made with reference to and compelled by the water line rates between said coasts. The present coast to coast rail rates are imposed upon the carriers by the substantial and controlling competition of the water lines—a competitive factor felt at intermediate points in the inverse ratio to the distances these points are from the coast.

(*c*) Products and manufactures moving to Pacific coast terminals have to compete with products and manufactures of like nature carried there from foreign countries by ocean carriers.

(*d*) Rail carriers to the Pacific coast have to compete with each other for the terminal traffic.

(*e*) Rates to the Pacific terminals from Missouri River, Chicago and Pittsburg territories cannot be higher on competitive traffic than rates from the Atlantic coast to those terminals and rates on non-competitive traffic from these territories cannot be higher than the combination of the rail rates to the Atlantic coast plus the water rates therefrom to the Pacific terminals.

(*f*) The rates from eastern defined territories to Pacific coast terminals are less than just and reasonable for the services performed, but yield some net revenue over and above the additional expense the carriers are put to in the movement of traffic thereunder. In other words, the difference between the expenses of the carriers with and without the traffic to the terminals is less than the revenue yielded by such traffic.

(*g*) The rail rates to the Pacific coast terminals cannot be increased without losing the terminal traffic to the water carriers.

(*h*) To comply with the orders of the Commission the carriers must either lose the terminal traffic to the water carriers or reduce their intermediate rates to a point below what is just and reasonable.

ARGUMENT.

I.

The Commerce Court Had Jurisdiction of the Suits.

By their assignment of error appellants question the jurisdiction of the Commerce Court only in the *Fourth Section* case (Numbers 883, 928). That the court was without jurisdiction of the *Spokane* case is not alleged or suggested in their assignment. As already stated, the order attacked in the latter case is in all respects identical with the order attacked in the former except that (a) it professes to dispose of a formal *complaint* against rates, whereas the Fourth Section order disposes simply of the carriers' applications for relief; (b) the carriers are required to observe it for a period of two years, whereas in the Fourth Section order no definite period is fixed; and (c) the carriers to whom it is directed form only a part of those affected by the Fourth Section order. Both orders apply in the same territory and require the same things. Obedience to one would necessarily be obedience to the other, and a violation of one would be a violation of the other.

1. The ground upon which appellants assert that the Commerce Court was without jurisdiction of the Fourth Section case is that the order attacked in that case, though an order in form, is not one in fact, or within the meaning of that section of the act giving to the Commerce Court jurisdiction of cases brought to set aside or

enjoin "orders" of the Commission. Appellants say the action of the Commission in passing upon applications under this section is something of which the carriers cannot complain, whatever may be the disposition of them. As stated in the brief filed on behalf of the Commission: "It was not necessary for the carriers to apply to the Commission for relief, and having elected to do so they are *bound* by the action of the Commission." (p. 17.) When the Commission allows an application *to any extent* this, appellants say, is "in favor of the carrier and it is evident that such a result is not one concerning which the carrier can consistently complain." (Brief, p. 16.) "The act of the Interstate Commerce Commission in exempting the carrier," say counsel, "is in the nature of an *act of grace* (Brief, Chicago Association of Commerce, p. 35, 37); and, of course, a petitioner for grace or favor cannot rightly complain that the grace accorded to him is not greater than it is. The power lodged in the Commission under such a construction of the section is freely conceded to be so great as to be well-nigh appalling. The Commission says in its twenty-fifth annual report that it is "enormous" (page 41). The argument here is that it must also be unrestrained.

We think it important for the court to apprehend clearly appellants' contention upon this point, because, while they advance it with special reference to the question of jurisdiction, it really marks the essential difference between their views and ours as to the meaning of the amended Fourth Section. Their position is that in applying under the proviso of that section for relief from its hard and fast rule, the carriers are asking something in the nature of "grace," or "favor"—a dispensation; that they are not in the realm of *rights* at all; that they

are not *obliged* to apply to the Commission for relief, and that "having elected to do so" they are bound by and must remain satisfied with what the Commission gives them. (Brief, p. 17.) All of this follows certainly, if, in passing upon these applications, the Commission is merely the dispenser of grace or favor; because if the carriers have no *rights* under the proviso, if they are merely petitioners for *grace*, there is something essentially incongruous in the idea of a petitioner for grace filing a formal complaint in court because it was denied him.

But the constitutional difficulties in the way of the adoption of this extreme view are insurmountable. If Congress did by this enactment really seek to vest in the Commission a power or discretion of this untrammeled character, the law is plainly invalid, as is conceded by the Commission (Printed Rec. No. 883, p. 166), and as we shall endeavor to show hereafter. It is true, doubtless, that some discretion may be constitutionally reposed in executive or administrative officials in some instances, provided the act conferring it affords a rule or standard by which it is to be exercised, and an exercise in violation of such standard may be corrected or restrained; but the well known cases establishing this doctrine (*Field* v. *Clark*, 143 U. S. 649, 693; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Company* v. *United States*, 204 U. S. 364) all make it plain that the presence of this rule or standard *is what saves the act*. Now, a standard implies a duty to observe it. It is idle to talk of a standard being necessary for the guidance of executive or administrative bodies if there be no way of calling them to account for their non-observance of it. But if they must observe

it, then, in exercising a discretion *thus controlled*, they are not dispensing grace or favor, but are observing law, and in that case the petitioner having a *right* to have the rule or standard observed is not asking for favor, but for that to which he is entitled, and can, of course, complain when it is denied him.

Appellants rely upon *Louisville & Nashville Railroad Co.* v. *Kentucky*, 183 U. S. 503, and insist that that case is authority for the proposition that the bestowal upon a Commission of the absolute right, unrestricted by any rule or standard, to say when more may be charged for the shorter than for the longer haul, does not involve an unlawful delegation of legislative power. But that case will be found, on examination, to lay down no such rule.

It was decided on writ of error to the Court of Appeals of Kentucky, prosecuted to reverse a sentence of conviction for alleged violation of a constitutional and statutory provision of that state.

Section 218 of the Kentucky Constitution adopted substantially the provisions of the fourth section of the Interstate Commerce Law as it stood prior to its amendment, as applicable to transportation within that state. (183 U. S. 489.)

Section 820 of the General Laws of Kentucky of 1894, adopted to carry the above constitutional provision into effect, made it a misdemeanor to charge a greater compensation for transportation under substantially similar circumstances and conditions for a shorter than for a longer haul over the same line in the same direction, the shorter being included within the longer distance, and provided for the recovery of a fine, and that on complaint to the Railroad Commission that any railroad carrier

had violated the provisions of this section it was made the duty of the Commission to investigate the grounds of complaint, and if it deemed it proper to exonerate the railroad carrier from the operation of the provisions of this section it was to make an order in writing to that effect and publish the same as a part of the report of the Commission. After such order the railroad carrier should not be prosecuted or fined on account of the complaint. But if after investigation the Commission failed to exonerate the railroad carrier from the operation of this section an order in writing to that effect should be made by the Commission and published as a part of its report, and it should then be the duty of the Commission to furnish a statement of the facts with a copy of its order to the grand jury so that the railroad company might be indicted for the offense. (183 U. S. 491.)

The railroad company, without obtaining the permission provided for, continued to charge more for a shorter than for a longer haul over the same line in the same direction, the shorter being included within the longer haul, and was thereupon, after investigation by and upon the recommendation of the Railroad Commission, indicted for alleged violation of Section 218 of the Constitution and Section 820 of the statutes.

At the trial certain facts, which were alleged as showing that the circumstances and conditions under which the charges in question were made and received were not substantially similar with those ordinarily obtaining,—and this to show that the charges objected to were just and reasonable,—were offered in evidence by the railroad company but rejected by the court on the ground that competition at the more distant point, which was

relied upon, was not one of the circumstances or conditions exempting the railroad company from the operation of Section 218 of the Constitution, the court thus refusing to follow this court's construction of a similar provision in the Interstate Commerce Law, and the jury was peremptorily instructed to find the defendant guilty, which was done. The conviction was affirmed by the Court of Appeals.

With reference to the above ruling this court said, on page 512:

> "Nor, as we have already seen, is it for us to say that the Court of Appeals of Kentucky erred in so construing that enactment as to forbid a railroad company from justifying a voluntary disregard of its command by claiming that competition between its road and other modes of transportation created substantially dissimilar circumstances and conditions."

The Court of Appeals of Kentucky put its decision upon the following ground:

> "The railroad commission was therefore created to meet the emergency, and was intended to be invested with full power to authorize or not in special cases less compensation to be charged for the longer than shorter distance, and to prescribe from time to time the extent to which the common carrier may be relieved from the operation of the section. In our opinion the court has not jurisdiction to either compel the railroad commission, upon application of the common carrier or those interested in particular industries or callings, to suspend or relax operation of Section 218, or, upon application of individuals or corporations feeling aggrieved, to prohibit suspension or relaxation in special cases. While the commission is thus, and to that extent, free from judicial interposition, it cannot of course nullify or, except in special cases, at all suspend operation of Section 218; and though the railroad commission be invest-

ed with this unusual power, it must be treated as a constitutional power with which the court cannot interfere." (See pp. 509, 510.)

Thus it will be seen that the state court based its decision upon the ground that under the Kentucky Constitution the determination of what special cases did not fall within the rigid rule of the constitutional provision was vested in the Railroad Commission; and such determination was the exercise of a constitutional power with which the court could not interfere.

In this court the constitutional provision was challenged as not affording due process of law, in that by vesting the power of determination or ruling in an administrative body without any definite guide, it denied the railroad company the right to a lawful use of its property. But the railroad company being organized under the laws of Kentucky was amenable to its Constitution, there being no contract right involved. The ultimate question, therefore, was merely whether the vesting by the Kentucky Constitution of such power in such a tribunal was violative of the Federal Constitution. Whether the power vested in the Commission is regarded as legislative, judicial or executive, or a combination of all three, does not involve a federal question or a violation of any provision of the Federal Constitution since a state has the right by its Constitution to combine an exercise of such powers in a single body if it chooses to do so.

But with reference to the character of the Kentucky Commission and its function under the State Constitution this court said in view of the construction of the State Court, on page 515:

> "We are not prepared to accept the view that the railroad commission, in acting under Section 218, is merely an administrative body, and as such subject to judicial review. It is rather a constitutional tribunal, empowered, *upon the application of the carrier,* to investigate the special circumstances and conditions which are claimed to justify the relief of the carrier from the operation of this section."

The ruling of the State Court as to the function and power of the State Commission under the constitution and statute of that state would be conclusive upon this court, for by appropriate constitutional provision judicial power might be vested in other tribunals than courts as legislative power might also be vested in other bodies than the legislature.

The Commission of Kentucky is not, as this court says, "merely an administrative body" but "a *constitutional tribunal.*" But what the Commission of Kentucky is *not* is precisely what the Interstate Commerce Commission *is;* namely, "a subordinate administrative or executive tribunal."

> *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 487.

The Interstate Commerce Commission could not be made otherwise under the Federal Constitution. It could not be vested with judicial power as such, nor could it be vested with legislative power, properly speaking. Much less could there be validly vested in such tribunal a combination of these powers.

Section 1, Article 1, of the Constitution of the United States provides that "*all* legislative powers herein granted shall be vested in a Congress of the United States." *All* of the legislative powers of the United

States being vested by the people in Congress, *none* of them can be transferred by Congress to an administrative or executive tribunal; and it is certainly no answer to this to say that such powers *may* be vested by the people of a *state* by the *state* constitution in a constitutional tribunal.

Counsel for the Chicago Association of Commerce in their brief (p. 84) seek to obviate by anticipation the distinction above relied on and to show that the distinction is groundless. They say, in effect, that while it is true the Kentucky Commission was in that case recognized and declared to be not a mere administrative body, but a "constitutional tribunal" invested by the people of Kentucky with power to determine finally, in a field where that state was supreme, the issues raised on an application like those under consideration here; and while it is also true that the Interstate Commerce Commission *is not* a constitutional tribunal but *is* a mere administrative body,—yet that this does not help us because the case of *Interstate Commerce Commission* v. *Delaware, Lackawanna and Western Railroad Co.*, 220 U. S. 235, and cases there cited, have held that the decisions of an administrative body are not *all* subject to review and that upon *some* of the questions coming before them the decisions of the Interstate Commerce Commission are final.

But, with deference to counsel, we submit that there is confusion of thought here. The proposition which they profess to be supporting, is that the Commerce Court is *without jurisdiction* to pass upon the case presented by these petitions; but here they confound the question of *jurisdiction* with the question of what the decision must be on the case presented. If a carrier were

today to present to the Commerce Court a petition complaining that the Commission had done some of the very things complained of in the *Delaware, Lackawanna & Western* case, the court would certainly have *jurisdiction* of it, although its decision upon the merits would be controlled by that case.

It is plain, then, that the adoption of this extreme view of the Commission's powers, under the fourth section, as amended, cannot be sustained without ascribing to that section a meaning which at once brings it into collision with the constitution. But, on the other hand, it is obvious that nothing *short* of the adoption of this extreme view can sustain appellants' contention that the courts are *without jurisdiction* to hear a carrier complaining of the action taken by the Commission upon one of these applications. We say their contention is that *the courts* are without jurisdiction, because they certainly argue that jurisdiction is not in the Commerce Court and the Government will doubtless concede that it is in the Commerce Court or it is nowhere. And it is so plain, as stated, that *any* concession from this extreme view is fatal to their contention, that it is astonishing to find counsel speaking of the absence from our petitions of any averment of "fraud or corruption" (I. C. C. brief, p. 15), or "arbitrariness" (Chicago brief, p. 85), as though the presence of such averments would change the situation. What have averments of fraud or corruption or arbitrariness to do with the question of *jurisdiction?* If the Commission, in passing upon these applications, is a mere dispenser of grace, if the carriers in filing them are merely petitioning for favor, it would be an idle thing, not to say an absurd thing, to complain that the grace or favor had been "fraudulent-

ly" or "arbitrarily" withheld. Do counsel concede that if our petitions had contained an allegation of fraud or arbitrariness, the court would have had jurisdiction? If so, they yield their whole point. One who complains that something was "arbitrarily" denied him by another does, from the very necessities of the case, imply that he was *entitled* to have it awarded him; that he had a *right* to it; and in asserting a right to it he excludes the very idea of favor. If, in any conceivable circumstances, it is the *duty* of the Commission to grant the carriers' application, it is passing upon *rights* and not dispensing favor when it disposes of it. Its denial of the full extent of those rights is an *order* in the most elementary sense, and a bill or petition complaining of it (and it is of this that our petitions complain) is one of which the Commerce Court has *jurisdiction;* and it is the question of *jurisdiction* which we are here considering. The merits of our petition are utterly beside the question here. It may or may not be demurrable. It may or may not be "dismissable" as for want of equity; but it is *entertainable,* and that is jurisdiction.

We, therefore, submit that appellants must accept one or the other of these alternatives: The Commission in passing upon these applications is either (a) merely denying or withholding favor, and then the section assuming to vest such power in them is unconstitutional; or (b) determining the *rights* of the applicants, and then their action, which is essentially an order, and in this case is called such by the Commission itself (Printed Rec., p. 33, case 883), is reviewable by the Commerce Court.

2. The contention above considered is the only one advanced by the Commission in support of the proposition that the Commerce Court was without jurisdiction of the Fourth Section case; but an additional contention is advanced by counsel for the Chicago Association of Commerce, one of appellant interveners, which must now be noticed. It is argued in their brief that, because of the special limitations in the section defining the jurisdiction of the Commerce Court, that court had no jurisdiction of the case, even though it be a case which the United States courts of general equity jurisdiction might have entertained previous to the act of June 18, 1910, creating the Commerce Court. The argument is that that act gave to the Commerce Court only the jurisdiction *then* (June 18, 1910) possessed by the Circuit Courts of the United States over "cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission"; that this case is one which "could not have arisen prior to June 18, 1910," because it arises solely in consequence of amendments made by that act; that in connection with the grant of jurisdiction to the Commerce Court, it was specially provided by Congress that "nothing contained in this act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the commerce court"; and that, therefore, to construe the act as vesting jurisdiction in the Commerce Court of cases involving the amended fourth section is to "enlarge the jurisdiction" transferred to the Commerce Court, in violation of this limitation clause. The contention is an extremely attenuated one and there are two plain answers to it:

(*a*) It is not true that cases involving applications made under the proviso of the Fourth Section could not have come before the courts prior to June 18, 1910. That proviso was in the section from the date of its enactment in February, 1887; and while it is true that when circumstances and conditions were actually different at the point at which it was desired to make the lower charge for the longer haul, the carrier was free at its risk to make such charge without previous authorization from the Commission, it had, nevertheless, in cases of doubt, the plain right to make such an application and to a review by the courts of an order denying it. The mere fact that such applications were seldom made, in view of the interpretation finally placed on the section in the *Alabama Midland* case, 168 U. S. 144, is no argument for the proposition that the right did not exist to make them, or that it was not the duty of the Commission to pass upon them, for that right and that duty were created in the plainest terms by the statute as originally enacted.

(b) But even if the right to apply under this proviso had been given for the first time in the act of June 18, 1910, it would not follow, as counsel assume, that the jurisdiction of the courts would have to be "enlarged" before they could consider a controversy involving such an application. Counsel say that it is true the jurisdiction of the general equity courts of the United States "would automatically be increased to cover" this new class of cases. But the fallacy of their argument lies in their notion of what constitutes an *increase* or *enlargement* of a court's jurisdiction. A court which has jurisdiction of a clearly defined class of cases cannot be said to have its jurisdiction increased according as there is an increase in the number of cases falling within that class; and ob-

viously this is true whether the court is a court of general or of limited jurisdiction. The Court of Claims, for instance, though a court of limited jurisdiction, which cannot be enlarged except by act of Congress, is undoubtedly entertaining claims every day *falling within the class of cases committed to its jurisdiction,* but arising out of situations and legislative acts which were not dreamt of when that court was created and its jurisdiction defined; and yet no one would say that its jurisdiction was "enlarged" in consequence. And so the Commerce Court, having been given jurisdiction of the *class* of "cases brought to enjoin, set aside, annul or suspend in whole or in part *any* order of the Interstate Commerce Commission," must, of necessity, have jurisdiction of all cases falling within that class, whatever the date of the legislation out of which they arise.

A most remarkable situation would exist if counsel's contention were to be sustained. There can be no doubt that it was the purpose of the act creating the Commerce Court to give to that court exclusive jurisdiction of cases brought to review the action of the Interstate Commerce Commission. The act in terms provides that its jurisdiction shall be exclusive over cases of the "*classes*" in question. But, if counsel be correct, it follows that as the Commerce Court has no jurisdiction over cases which, though falling in one of those "classes", yet arise out of new features introduced into the Act to Regulate Commerce by the amendment of June 18, 1910, then the action of the Commission in the very large fields covered by those amendments is absolutely unreviewable by any court; and all orders relating to telephone, telegraph and cable companies, all orders made under the new powers given in regard to through routes and classifications, all

orders in regard to the suspension of new schedules, all orders establishing rates after investigations made on the Commission's own initiative, must be treated as final, not because the Commerce Court has not been given jurisdiction over cases attacking this *class* of orders, but because it would "enlarge" that jurisdiction if it were to consider all cases falling within the class. Surely an interpretation leading to such results is unsound.

In leaving this discussion we would invite the court's attention to the provisions of Section 16 of the Act as amended in 1906 conferring upon the court's jurisdiction to hear and determine suits "to enjoin, set aside, annul, or suspend any order or requirement of the Commission."

II.

The fourth section, as amended, in providing that the Interstate Commerce Commission may authorize carriers to charge less for longer than shorter distances for the transportation of passengers or property and may from time to time prescribe the extent to which the designated carrier may be relieved from the operation of the section, is unconstitutional and void, in that the statute prescribes no standard by which the Commission shall be governed in granting relief.

If it should be held that Congress by the amendment to Section 4 intended that unlimited discretion should be vested in the Commission in passing upon applications thereunder, and that the Commission may decide such applications according to its own notions, then it would be empowered to prescribe for itself any rule it pleased

in passing upon each particular application; and the applications would be determined, not according to some established rule or principle of law, but according to any view which, at the particular time they were acted upon, might be entertained by the Commission. In such case two things are apparent: First, that the railway companies would be deprived of their rights without due process of law because there would be *no law* applicable to the determination of such rights; second, that the Commission would be legislating because it would be granting or refusing relief to the carriers not in accordance with any standard provided by law, but in accordance with the unguided judgment, whim or caprice that at the particular moment might furnish a reason or excuse for its action. If the Commission may determine for itself what it will consider in passing upon the respective applications of the railway companies, and courts are bound conclusively by its determination, evidently the Commission is empowered to invent and apply one rule for one railway company and an entirely different rule for other, and they may be competing, railway companies. For illustration, take any two of the competing lines between Chicago and Kansas City. On the application of one of these lines the Commission, if uncontrolled, may consider evidence of the competitive factors applying to both and, giving them due weight, authorize a less charge over it for the longer than for the shorter distance and grant its application; but in considering the application of the other line it may decline to give effect to these same competitive conditions, and refuse its application. Thus, in determining the rights of one company, one rule would be applied; in determining the rights of the other a wholly different rule; the application of each rule resting in the

arbitrary discretion of the Commission. Therefore, if no primary standard is provided for the guidance of the Commission, but its determination, according to its own notions, is conclusive of the right of applicants, arbitrary power is confided to it. Nor is it an answer to say that the discretion would not be abused, nor the power arbitrarily exercised, for in determining the validity of a statute the question is not what is the sense of right or wrong which may influence the body charged with its execution, is not whether the powers confided to that body would be wisely or unwisely exercised, but is whether the statute confers on that body the right to exercise powers which under the constitution cannot be conferred.

Curtin v. *Benson*, 222 U. S. 78, 87.

The Commission itself felt, and in its opinions expressed the view, that the amendment to Section 4 would be invalid if arbitrary discretion were vested in it by that amendment and, therefore, sought to discover a rule for its guidance. We shall presently inquire whether, as determined by the Commission, the statute itself furnished the standard, but before doing so we wish to notice very briefly a few of the many decisions sustaining our contention that if a standard by which the Commission must be governed is not found in the law, if arbitrary discretion is granted it, the law is unconstitutional. We realize that there is a multitude of decisions on questions such as we are now considering, with many close analogies one with the other, and at the same time many distinguishing features one from the other, and that a great citation of cases, long quotations from them or a close analysis of them, would be a wearying task upon counsel and an imposition upon the court. So we shall

make only such reference to the decisions as may be illustrative of our point.

In the masterly decision of Mr. Justice MATTHEWS, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, this court held that an ordinance of the State of California, approved by the Supreme Court of that state, which vested an unlimited discretion in a state officer to pass upon the right of location and operation of laundries, was a denial of due process of law. In the opinion, page 369, he said:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

This language was quoted with approval in the opinion of Mr. Justice BREWER in *Chicago, Milwaukee, etc., Railway Company* v. *Tompkins*, 176 U. S. 167, 172.

Similar language has been used by Mr. Justice STORY in *United States* v. *Dickson*, 15 Peters 141, 162, as follows:

> "But, it is not to be forgotten that ours is a government of laws and not of men; and that the judicial department has imposed upon it, by the constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it."

Mr. Justice Matthews, in his opinion in the Yick Wo case, refers with approval to the decision in the case of *City of Baltimore* v. *Radecke*, 49 Maryland 217, in which it appeared that an ordinance vested in the mayor and city council unlimited discretion in granting or withhold-

ing a permit to use steam engines in the city. This was held invalid because it laid down no rules by which its impartial execution could be secured. The court said:

> "In fact, an ordinance which clothes a single individual with such power hardly falls within the *domain of law*, and we are constrained to pronounce it inoperative and void."

To the same effect are:

City of Richmond v. *Model Steam Laundry*, 69 S. E. 932.

Mayor of Hagerstown v. *B. & O. Railroad*, 68 Atlantic 490, 493.

In *Schaezlein* v. *Cabiniss*, 135 California 466; 67 Pac. 755, a statute provided that where any work was carried on in any factory in which were generated dust or injurious gases likely to be inhaled by employes, and where it appeared to the Commissioner of Labor that such inhalation could be prevented by the use of some contrivance, he should order the same to be used, making it a misdemeanor to violate the provision of the act. This statute was held unconstitutional as making the judgment of the Commissioner conclusive and authorizing him, not to enforce a law, but to make one himself.

In *Mathews* v. *Murphy*, 23 Kentucky L. R. 750; 63 S. W. 785, a statute which authorized the State Board of Health to revoke the license of a physician for grossly unprofessional conduct of a character likely to deceive or defraud the public, was held void as not affording due process of law.

Also, in *Tilman* v. *Cooke*, 9 Baxter (Tenn.) 429, it was held that the legislature could not invest even a court with power to determine in its discretion the rule which should govern the rights of parties in respect to a mat-

ter before it. There the statute disqualified parties to a suit in certain cases from testifying "unless required to testify thereto by the court." In the opinion it is said:

> "This is to leave the rights of parties depending on the will of the judge, with no rule prescribed by which he is to be guided in his action—nothing by which a party can say it is his right to be heard. In a word, in the place of a rule of action prescribed being made the test of the right of the party, the court makes the rule and enforces it, or refuses to make it, as he chooses; thus performing a legislative act, that is, giving the law to a party in the particular case, not deciding upon what that law is."

It has been held in a number of cases that the legislature cannot confer upon an executive or administrative board the power to determine in its uncontrolled discretion the rights of parties, nor to prescribe rules or impose duties except according to some standard fixed by the legislature.

See:

State v. *G. N. R. R. Co.*, 100 Minnesota, 445; 111 N. W. 289.

L. & N. R. R. Co. v. *Commonwealth*, 99 Kentucky 32; 35 S. W. 129.

State v. *Cincinnati Gas, Light & Coke Co.*, 18 Ohio St. 262.

Anderson v. *Manchester Fire Assurance Co.*, 59 Minnesota 182; 60 N. W. 1095; 63 N. W. 241.

O'Neil v. *American Fire Insurance Co.*, 166 Pa. St. 72; 30 Atlantic 943.

Dowling v. *Lancashire Insurance Company*, 92 Wisconsin 63; 65 N. W. 738.

Wyeth v. *Thomas*, 200 Mass. 474; 86 N. E. 925, 926.

Cooley's Const. Lim., 7th Ed., 527.

These principles were laid down by this court so long ago as *Wayman* v. *Southard*, 10 Wheat. 1, 43, where the court say:

> "It will not be contended that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But congress may certainly delegate to others powers which the legislature may rightfully exercise itself. * * * The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details."

The distinction is quite clearly drawn in *Field* v. *Clark*, 143 U. S. 649. At page 692 the court say:

> "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

The court quote (page 693) from a decision of Judge RANNEY of the Supreme Court of Ohio, which has been cited in very many cases, as follows:

> "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

We feel inclined to apologize for extending the citation of authority even thus far, but find warrant for so doing in the claim of very broad powers in the Commission made in appellants' briefs. The reasons impelling us to forego further citation of authorities likewise impel us to forego analysis or discussion of the authorities cited by appellants.

The real question, then, is not whether the amended fourth section is unconstitutional if it leaves arbitrary discretion with the Commission, but is whether such discretion is granted. This must be determined from a consideration of the statute itself.

The section, so far as it is now necessary to consider it, is as follows:

> "It shall be unlawful for any common carrier * * * to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance. * * * *Provided, however,* that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

It is immediately apparent that the section itself furnishes no standard. It may be accurately skeletonized thus: The carrier shall not, without the consent of the Commission, given after investigation, charge more for a shorter, included within a longer, than for the longer haul. What circumstances are to guide the Commission in its investigation and determination, what the conditions are which must be found to exist before the carrier may be relieved from the inhibitions of the section is not even remotely indicated. So far as the section shows, the investigation may be as to the wealth or poverty of the carrier, its present necessities caused by unwise extensions of its lines; whether its traffic is light or heavy; in a

word, may be directed to any financial, traffic, transportation or other condition which may appeal to the discretion or caprice of the Commission.

We shall notice hereafter the effect of removing from the section the words "under substantially similar circumstances and conditions" if the section is to be upheld. Here we consider what effect those words had in determining the constitutionality of the section. These words were in the statute from the time of its enactment until the amendment of 1910. They furnished a standard by which the Commission was to be guided in relieving the carrier from the inhibitions of the fourth section. If the dissimilar circumstances existed relief could be had, otherwise it could not be had.

It is true that under the construction given the law by the courts the carriers might determine for themselves the question of dissimilarity—of course, at the risk of being subjected to the penalties of the law if their determination was wrong—but it is equally true that on each application for relief brought before the Commission the same standard was fixed for its guidance. There can be no doubt, we think, that the original fourth section did furnish a standard. Nor can there be any doubt that the present fourth section furnishes none.

Can the amended fourth section be upheld by reading it in connection with the remainder of the statute and finding in it a standard, not which it may, but which it must apply?

In the first section it is declared that rates shall be just and reasonable; in the third that they shall not be unduly discriminatory. If the fourth section is constitutional, it is because these sections, or one of them, furnish a

standard from which the Commission may not depart in determining applications for relief.

The wording of the first section is:

> "All charges made for *any service rendered* in the transportation of passengers or property * * * shall be just and reasonable; and every unjust and unreasonable charge *for such service or any part thereof* is prohibited and declared to be unlawful."

If anything were needed to make clear the meaning of this section we have it in the decision of this court in the case of *Southern Pacific Co.* v. *Interstate C. C.*, 219 U. S. 433, where it is held that the just and reasonable rate which the section prescribes is a rate reasonable in and of itself for the service rendered.

To what does this bring us? We are seeking to find a standard by which the Commission must be governed in granting relief from the long and short haul clause and we are trying to find that standard in the declaration of the first section of the act that every charge shall be just and reasonable for the service rendered. But the very purpose of the fourth section is that, upon authorization of the Commission, the carrier may at the more distant point charge a rate less than just and reasonable for the service done, while maintaining a higher rate at the intermediate point.

Is there any escape from the conclusion that a law saying that all charges shall be just and reasonable for the service rendered, gives no guide to an administrative body by which it may grant relief in permitting a charge to be made at the further point which is professedly less than just and reasonable, while a reasonable higher charge is maintained at the intermediate point, where the very purpose of the application is to obtain authority to make such an adjustment?

Does the third section afford a standard? It must be remembered that that section does not forbid all discrimination but only that which is undue. The paragraph now under consideration is as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

It has been uniformly held both by the Commission and the courts that when there are competitive conditions making the circumstance of carriage different—as, for instance, meeting by a longer line at the junction point the competition of a carrier having the shorter line, meeting the competition of a water carrier at the more distant point—there is no undue discrimination in charging the higher rate for the shorter haul contained within the longer. In *E. T. V. & G. Ry. Co.* v. *I. C. C.*, 181 U. S. 1, at page 18, this court say:

> "In a supposed case when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable pref-

erence or advantage will not apply. The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the *Behlmer* case, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is because of the preference, and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination.

The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it. We say seemingly on the one hand and apparently on the other, because in the supposed cases the preference is not 'undue' or the discrimination 'unjust.' This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge."

But if the making of the less charge to the more distant point works no discrimination, how can a statute saying there shall be no undue discrimination serve as a guide to determine when the lesser rate may be made for the longer haul? If, in the language of this court, above quoted, "the prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers," how can it be that the section forbidding undue discrimination and defined by the court as applying only to the voluntary act of the carriers, not to conditions wholly beyond their control, can serve as a guide to the Commission in authorizing a lesser rate for the greater distance when such rate is "the result of conditions wholly beyond the control of such carriers"?

If the part of the section authorizing the Commission to relieve the carrier from the prohibition of charging more for the short than for the long haul is unconstitutional, then the entire section is unconstitutional.

Trade-Mark Cases, 100 U. S. 82, 98.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565.

III.

The proper interpretation of the fourth section (assuming it to be constitutional); the power and functions of the Commission and the rights of the carriers upon applications for relief.

(a) *History and meaning of the amendment to the fourth section.*

In the case of *Texas & Pacific R. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, at page 218, this court said:

> "Even in construing the terms of a statute, courts must take notice of the history of the legislation, and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions and, therefore, most likely to have been the construction intended by the law-making power. Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress."

At page 211 they say:

> "So, too, it could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation."

At page 218 they say:

> "As we have already said, it could not be supposed that Congress, in regulating commerce, would intend

> to forbid or destroy an existing branch of commerce, of value to the common carriers and to the consumers within the United States. Clearly, express language must be used in the act to justify such a supposition."

While the Court has held that the expressions of individual members of congress as contained in the Congressional Record are not a proper source of information from which to ascertain the intent of Congress, it has held that the history of the passage of a law through Congress, the amendments made, offered and rejected, and the reports of committees may be properly considered in arriving at the intent of the law makers. The legislative history of the adoption of the original fourth section in 1887, and also of its amendment in 1910, shows clearly that Congress at no time intended to prescribe a hard and fast rule, but, on the contrary, at all times intended that there should be free play allowed for the operation of competitive factors. In respect to the original fourth section adopted in 1887 nothing further need be said than to quote the remarks of Judge COOLEY *in re L. & N. R. R. Co.*, 1 I. C. C. 31, 76:

> "It is perfectly clear that the intention of the original framers of the Senate bill was, to leave it to the discretion of the Commission, to exempt carriers from the operation of the rule in cases when the 'great law of competition' made such a relaxation proper, having in view the interests of the carriers and the people."

Speaking of the history of the bill in both the Senate and the House, at page 77, he says:

> "It is obvious, therefore, that, in the House as well as in the Senate, it was understood that the existence of competition was intended to be included in the margin of discretion provided for by the Senate measure.

The question as to this point was distinctly marked; the debate, so far as this section was concerned, was upon that basis. On July 30, 1886, the substituted bill was agreed to and passed on the part of the House. A conference committee was appointed, and at the second session of the Congress that committee agreed upon a report which was presented to the Senate December 15, 1886. By this report the fourth section of the Senate bill was amended so as to read as it now stands.

The work of the conference committee was very elaborately and carefully performed. The two bills which were referred to it presented very clearly the views which had prevailed in the two houses respectively, on the general subject of relative charges on long and short haul traffic—the House view of an inflexible rule, forbidding absolutely the greater charge for the shorter haul, and the Senate view that the rule should be subject to exceptions when the circumstances and conditions required it. The conference committee accepted deliberately the Senate view, and presented it, in the report to the two houses. In the Senate the report, before adoption, was discussed, and what was proposed by it on this point of vital interest was very distinctly brought out and made prominent; and in the House where also the report was adopted, nothing which was said by anyone indicated that the situation was otherwise understood.

It is impossible to resist the conclusion that in finally rejecting the 'long and short haul clause' of the House bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the fourth section as it had passed the Senate, both houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and, among others, in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition was to continue. And water competition was beyond doubt especially in view.

> In thus deliberately making provision for competition, even though it might be necessary to allow for the purpose exceptions to the general rule laid down in the statute, Congress must be supposed to have done so because the public interests required it."

The fourth section as enacted in 1887 stood unchanged until amended by the Act of June 18, 1910. The legislative history of that amendment on its passage through the House is comparatively simple and is as follows:

January 10, 1910, Mr. Townsend introduced a bill (H. R. 17536) to create an interstate commerce court and to amend the Act to Regulate Commerce. The bill was referred to the committee on Interstate and Foreign Commerce (Cong. Rec. 61 Congress, 2d Session, p. 497). It was reported from that committee with an amendment by Mr. Mann on April 1, 1910 (p. 4146). By the bill thus reported the fourth section was amended so as to read exactly as it now reads. Speaking for the committee in support of the proposed amendment, Mr. Mann, on April 12th, said:

> "The next proposition in the bill is an amendment to Section 4 of the Act to Regulate Commerce, known as the long and short haul clause. The Act to Regulate Commerce provided that it shall be unlawful for any common carrier, subject to the provisions of the act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for the shorter or longer distance over the same line in the same direction, and so forth. The intention of the act was undoubtedly to provide that in general, as an ordinary proposition, a railroad company should not charge less between two points than it charged between one of those points and a point midway or part way between the original two points. In other words, they should not be allowed to run freight

from point A through point B to point C and charge less between A and C than they charge between A and B. And yet water competition seems to prevent a hard and fast rule on that subject, because railroads are necessarily in competition not only with regular passenger and freight steamers, but also with tramp ships on the ocean and on the lakes and rivers, and must compete with these vessels. And it may often happen that the railroad company under the principles which underlie the making of freight rates between points A and B, and yet can afford to make some profit out of carrying freight at a lower rate between A and C. That theory controlled Congress when it enacted the original act, and I think no one has ever contended that there may not be cases where, under proper management of railroads, a less charge may be made for a long haul than for a short haul." (Cong. Rec., Vol. 45, part V, page 4795.)

* * * * * * *

"I will say to the gentlemen with perfect frankness, it may not be proper for a railroad to carry freight in competition with water transportation, and carry it at a rate which might pay something toward expenses and maintenance, and possibly something toward interest on bonds, and still would be so low that if the railroad company carried all its freight on that basis it would go into the hands of a receiver inside of a year's time. Yet it might be perfectly proper for the railroad company to get a part of that freight for its transmission, while it would not be proper to expect the company to carry all of its freight at that rate. That is wholly under the control of the Interstate Commerce Commission. Under the existing law the Interstate Commerce Commission has the power to fix the maximum freight rate. The Commission may say what is a reasonable rate to different points; but if, in order to get some of the business which would otherwise all go by water, the railroad company wants to carry freight at less than is a reasonable rate on all its business, nobody would wish to prevent it from doing that, because to that extent you could lower the rates. * * *

* * * * * * *

"Take, for instance, transcontinental transportation. You can carry freight now from New York to San Francisco for less than you can from the Mississippi River to Ogden, Utah, and there is good reason for the discrimination. Freight from New York to San Francisco is in competition with vessels going around Cape Horn or steamers trans-shipping at Panama. That competition will be still more strenuous when the Panama Canal is constructed, and it may happen that a railroad company cannot afford to make as low a rate between all intervening points and cannot afford to do without carrying part of the freight between the extreme points. There may be reasons. I do not undertake to pass upon the particular case, but I can see reasons why the rate from New York to San Francisco may be made less by the Commission possibly than the rate from Chicago to some point in Nevada." (Cong. Rec., Vol. 45, part V, page 4580.) * * *

"I think that San Francisco and New York and other ports on the ocean have a natural advantage which cannot, and ought not if it could, be taken away from them. In other words, when you come to the question of fixing freight rates, please remember these propositions: A railroad company must pay its operating expenses. It must pay the cost of maintenance. It must pay the cost of its general offices. It must pay the interest on its bonds. It must pay, if it is successful, dividends on its stock. It must carry some freight at profit enough to make dividends on the stock.

"It may carry some freight which will help it to pay interest on its bonds, and it may be met by a situation where it can carry a large amount of freight at rates which will more than pay the operating expenses or a proportionate share of the operating expenses, which will more than pay its proportionate share of the cost of maintenance, which will more than pay its share of the cost of general offices, which will contribute something to the interest on the bonds, but which will not contribute anything towards dividends on the stock, or which will not even contribute

enough toward the interest on the bonds to pay more than 1 to 2 per cent., whereas the rate would be 4 or 5 per cent. Now, with that large amount of freight which it may get if it competes successfully with other methods of transportation, it is the duty of the railroad company to secure that freight at lower terms than are practicable to pay interest and dividends if it carried all freight on the same basis, and that will be true forever in railroads in competition between New York and San Francisco, competing with ocean methods of transportation, and ought to be so. It is true through many parts of the United States, and ought to be so, because in the end it tends to reduce the rates on freight throughout the country." (Cong. Rec., Vol. 45, part V, pages 4796-7.)

On May 10 the House bill, after being amended in some particulars (no change being made, however, in the proposed fourth section), passed the House (p. 6030) and on the following day, having been sent to the Senate, was referred to the Senate committee on Interstate Commerce (p. 6062).

The course of the legislation through the Senate was as follows:

On February 25, 1910, Mr. Elkins introduced a bill (S. 6737) to create a court of commerce and to amend the Act to Regulate Commerce, and it was favorably reported without amendment. (Cong. Rec. 61 Congress, 2nd Sess. 2817.) The bill as thus reported contained no amendment of the fourth section. (Cong. Rec. p. 7273.)

April 11, Mr. Dixon offered an amendment in the way of an added section to be known as Section 6 b, and to read as follows:

"Sec. 6 b. That Section 4 of said Act to Regulate Commerce be amended so as to read as follows:

'Section 4. That it shall be unlawful for any common carrier subject to the provisions of this act to

charge or receive any greater compensation in the aggregate for the transportation of passengers or commodities of any kind for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the local rates; but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance.'" (Cong. Rec., Vol. 45, part V, page 4497.)

In support of this amendment, Mr. Dixon addressed the Senate on May 2, 1910 (Cong. Rec. p. 5653-5664). Three days later, on May 5, 1910, Mr. Dixon withdrew the proposed amendment and offered another one, saying:

"I want to say further, by way of explanation, that since the discussion over the long and short haul clause, after consultation with many senators who are in favor of the general principle but some of whom do not want to go to the extent of full prohibition against the short and long haul clause, the amendment which I offer is, in fact, the House provision with one clause of limitation."

The amendment thus offered read as follows:

"Sec. 7. That Section 4 of the act entitled 'An Act to Regulate Commerce,' approved February 4, 1887, be amended by striking out the words 'under substantially similar circumstances and conditions,' where the same appear in said Section 4, and further amend said Section 4 of said act by striking out all of said Section 4, beginning with the words 'provided, however,' said Section 4 when so amended to read as follows:

'Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like

property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the local rates; but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided further, that the rates for the shorter distance involved in the application are just and reasonable rates: And provided further, that no rates of charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where applications shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.'" (Cong. Rec., Vol. 45, part VI, pages 5830-5831.)

In the course of the debate on this amendment, the following observations were made by various senators:

"Mr. Piles: The senator may have abandoned his original amendment, but I did not understand that he had. I knew that he proposed a substitute for the amendment of the senator from Idaho, and I supposed that he was thereby endeavoring to catch us both going and coming." * * *

"Mr. Dixon: The senator from Washington is hardly correct in his supposition. I did submit a proposed amendment which was never offered, absolutely providing that the short haul should never ex-

ceed the long in price. But that amendment has never been offered. It was submitted as intended to be proposed.

The amendment now pending,and to which I really wish the senator from Washington would address his remarks, because it is the only one pending, simply shifts the burden of proof on the railroad company to show cause why it should charge more for the short haul than the long, instead of letting it rest on the shipper, as it is under the present Interstate Commerce Act. * * *

Can the senator from Washington or any other senator show me why that is not a reasonable proposition? In the event there is real water competition, let the railroads show it. They have the facts and figures, and the shipper does not have them. That is the contention that I think most of us at this time stand for." (Cong. Rec., Vol. 45, 61st Con., 2d Ses., page 5998.)

This amendment, stripped of its verbiage, means that the burden of proof must rest on the railroad company to show why it does it, instead of on the shipper and the little community, to show why the railroad should not do it. The railroad has all the facts. It merely shifts the burden of proof. The railroad claims the right to charge more for a short than a long haul. All right, if conditions exist, let them show it, and let them take advantage of it. It shifts the burden of proof. That is all there is in the amendment. Can any reasonable objection be made to it?" (Cong. Rec., Vol. 45, 61st Cong., 2d Sec., page 6014.)

"Mr. Bristow: That, of course, would be an ideal condition, but this amendment provides that where the railroad charges more for the interior shipment that it shall in substance show cause why that charge is made. It shifts the burden from the citizen who is unable to bear it, so that when the complaint is made the railroad then shows reason why such a charge is just.

It seems to me that there can be no reason why any senator should not support an amendment which

requires the railroad to show cause why it should be permitted to charge more for a less service. In my judgment, when the railroad is required to show cause why it makes this higher charge, it lifts from the burdens of the citizen a very great load, although it does not relieve him entirely. I am earnestly in favor of the enactment of this provision into the law because the citizen has a right when the railroad charges him more than somebody else to ask the Commission to have the railroad show the reason why it shall do so." (Cong. Rec., Vol. 45, part VI, pages 6022-6023.)

Mr. Simmons said:

"Under the present law the burden of showing that the railroads have wrongfully exempted themselves from the operation of this clause is cast upon the people, and the expense of reversing their action in that respect is thrown partly upon the government and partly upon the local public. If the Commission instead of the railroads is given the power to determine this question in the first instance, the burden of proof and expense in case of appeal by the roads from its decision will be shifted from the people to the railroads, where it rightfully should be placed, and action will be arrested until the question is finally settled by the courts.

The question at issue, therefore, is whether the law shall be so written as to give the advantage of first determination of this question to the railroads or to the people." (Cong. Rec., Vol. 45, page VI, page 6062.)

Subsequently and at the suggestion of various senators in the course of the debate, the bill was amended so as to amend Section 4 to read as follows:

"Section 7. That Section 4 of the act entitled 'An Act to Regulate Commerce,' approved February 1, 1887, be amended by striking out the words 'under substantially similar circumstances and conditions,' where the same appeal in said Section 4, and further amend said Section 4 of said act by striking out all

of said Section 4 beginning with the words 'Provided, however,' and further amend said Section 4 so that when amended it will read as follows:

'Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act, to charge or receive any greater compensation in the aggregate, for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route, in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the local rates; but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance; Provided, however, that the Interstate Commerce Commission may, from its knowledge, or from information, or upon application, ascertain that the circumstances and conditions of the longer haul are dissimilar to the circumstances and conditions of the shorter haul, whether they result from competition by water or rail; then it may authorize a common carrier to charge less for the longer than for the shorter distances for the transportation of passengers or property; but in no event shall the authority be granted unless the Commission is satisfied that all the rates involved are just and reasonable and not unjustly discriminatory nor unduly preferential or prejudicial. That no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission: *Provided, that such determination is made within one year after the passage of this act*: Provided further, that when application is made to the said Commission by a carrier to fix a lower rate for longer than for shorter distances on account of

water competition, said application shall not be granted if the Commission, after investigation, shall find that the lower rate asked for will destroy water competition.'" (Cong. Rec., Vol. 45, part VII, pages 7276, 7277.)

The Senate Bill being in this form on June 3, Mr. Elkins moved to strike from the House Bill (H. R. 17536) all after the enacting clause of the Senate Bill. This was done and one that date the bill passed the Senate containing the amended fourth section as last above given. (Cong. Rec. 7374.) The House having refused to concur in the Senate amendments of its bill, a conference was called for (Cong. Rec. 7568-7578) and had. The bill as reported from the conference amended the fourth section precisely as the House had originally amended it—that is the conference adopted the House Bill upon this point. The conference report was agreed to by the Senate June 17 (Cong. Rec. 8391), and by the House June 18 (Cong. Rec. 8485).

In the debate in the Senate on the conference report, the following observations were made:

"Mr. Borah. Mr. President, briefly I desire to call attention to Section 8 of the bill as it comes from the conference committee and to direct attention as to the doubtful legality or constitutionality of this provision as we now find it in the bill. I am not prepared to say, Mr. President, that the section will be declared unconstitutional; I am willing to admit that there is a possibility of its being sustained by the court. I believe, however, that the probability is that it will be declared unconstitutional. I can see no reason for leaving a provision of such importance in so doubtful a condition as to its constitutionality. When the bill left the Senate there was no doubt as to the constitutional feature of this provision of the bill.

The rule has been prescribed and provided for in

the section itself, and it was a very easy matter and a very simple matter to have retained it in the bill, which leads me to recall that the senator from Rhode Island (Mr. Aldrich), who was so much opposed to this provision of the bill, remarked when this particular section passed, 'He laughs best who laughs last,' and I am very much of the opinion that, aside from the long line of litigation to which it will give rise, in the end it will be found that this long and short haul provision of the law is invalid. I say this knowing that there are those who have given the subject some consideration who entertain a different view, but I also know that there is a doubt in the minds of practically all who have considered this matter as to is legality. The provision as it is found in the conference report reads as follows:

'Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act; but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided, further, that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six

months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section until a determination of such application by the Commission.'

I think, Mr. President, that all would agree, if this section were standing alone, that there would be no question about its being unconstitutional. It confers upon the Commission a power which we have not the power to confer—the legislative power. It prescribes no rule by which the Commission is to be guided in the discharge of its duty, and it is too well settled, of course, to take up the time of the Senate to discuss it; that such a rule must be prescribed; that the law must be enacted by the legislature, and that the only thing which the Commission can do is to carry into effect the law as it is written, to effectuate the rule which the legislative body establishes. The bill as it passed the Senate provided:

'Provided, however, that the Interstate Commerce Commission may, from its knowledge, or from information, or upon application, ascertain that the circumstances and conditions of the longer haul are dissimilar to the circumstances and conditions of the shorter haul, whether they result from competition by water or rail; then it may authorize a common carrier to charge less for the longer than for the shorter distances for the transportation of passengers or property; but in no event shall the authority be granted unless the Commission is satisfied that all the rates involved are just and reasonable and not unjustly discriminatory nor unduly preferential or prejudicial.'

For some reason within the wisdom of the conference committee that which was certain is made uncertain; that about which there was no doubt is now the subject of grave doubt. Even those who undertake to sustain the proposed law admit that they must do so by adopting a rule which the Supreme Court has not yet adopted. It may be that the Supreme Court will finally, when it comes to pass upon the matter, take the law by its four corners and find

within it somewhere a rule by which the Commission in this particular instance shall be governed. But it is yet a matter for determination whether the court will be able to say that the rule with reference to the discharge of its duty and the performance of its functions generally will avail—whether or not it will go into other provisions of the statute, in order to evoke or bring forth a rule by which to govern the Commission in the discharge of its particular duty in reference to the long and short haul.

It is clear that it cannot be sustained upon any other theory. Standing singly and alone, the section would fall instantly under the rule heretofore established by the court. As I have said, in view of the fact that it was certain, definite and legal when it passed the Senate, it is difficult to understand why it was not left in that condition in the conference report. It must inevitably give rise to litigation. It must necessarily impose upon the people the burden of litigating this matter.

I think the conference report, if I may say so, is subject to criticism on the ground alone. When it is so easy and so clear that the certainty could be established without question it is unfortunate indeed that it should be left where it must be determined by the court, with, I submit, the probability of its being declared unconstitutional."

It will be observed that in the Senate amendment it was provided, immediately following the provision concerning the application of the carriers, as follows:

"Provided, further, that the rates for the shorter distance involved in the application are just and reasonable rates."

That provision was struck out. So we must conclude that it was not intended that on such application it would be necessary to show that the rates for the shorter distance were just and reasonable. It is manifest, however, that Congress not only intended not to eliminate the ef-

fects of competition, but rather thought it was preserving them.

No rule of construction is better settled than that in construing a statute we must look to the old law, to the mischief, and to the remedy. So looking in this instance, we find that the mischief of the old law was in leaving to the carriers the determination, of their own motion, of what are dissimilar circumstances and conditions, and the power to initiate lower rates upon such determination, and in the abuse, or supposed abuse, with which they exercised the discretion granted them; that that discretion, that abuse, grew out of the words, "under substantially similar circumstances and conditions," and the construction placed on these words. It hence follows that the elimination of those words should have no greater effect than is necessary to correct the evil intended to be corrected. Following the rule of construction announced, we must hold it is not the intent of the law that when dissimilar circumstances and conditions exist, which from transportation and traffic necessities or commercial necessities indicate that a lower charge should be made for the longer than for the shorter haul, such charge may not be made; but that its purpose is to take from the carrier the right of determining in the first instance whether the circumstances and conditions are dissimilar, and commit this question, in the first instance, to the Commission under the rules of law and subject to proper judicial review.

(*b*) *Section Four as amended must be construed with reference to the other sections of the Act and given a meaning consistent with the powers conferred by them upon the Commission and with a procedure prescribed for the exercise of such powers. Therefore, in an investigation upon an application for relief from the rigid rule of the Fourth Section the First Section is not involved and the Commission erred in holding that the burden was upon the carriers to establish to its satisfaction that the existing rates to intermediate territory were reasonable in and of themselves.*

One ground relied upon by the Commission for its order was that the carriers did not prove to its satisfaction that the existing rates to intermediate points were reasonable in and of themselves—this notwithstanding a presumption which would exist in favor of the legality of the act of the carriers in making and establishing such rates.

Interstate Commerce Commission v. *Chicago Great Western Railway Co.*, 209 U. S. 119, 120.

Platt v. *Lecocq*, 158 Federal, 730, 731.

The only instance in which the burden of showing the reasonableness of a rate is thrown upon the carriers is in respect to a rate increased after January 1, 1910. (Amendment to Section 15, June 18, 1910.)

This would exclude the idea that the burden of justifying the reasonableness of rates in other cases was intended to rest upon the carriers.

No doubt, pending an investigation under an application for relief from the rigid rule of the fourth section, the Commission may, by order, institute an inquiry as to the reasonableness of a particular rate or rates to intermediate points, but in such case the reasonableness

thereof must be determined under the first section, and not made to depend on what relief may be granted under the application, and the burden of proof to show the reasonableness of these intermediate rates will not rest on the carrier. But in this case the Commission did not institute any inquiry as to the reasonableness of the intermediate rates, did not pass on that question, made no order fixing them, but left them to be adjusted by whatever rates might be established at the terminals according to the fixed percentages.

Again, the reasonablness of a transportation charge to an intermediate point is not to be measured by the charge to a different point, when it appears that the charge to the latter point is controlled by different circumstances and conditions. There must be identity or similarity of service, or of circumstances and conditions, regarding the charges before one may be made the standard of reasonableness for the other.

As the fourth section is only intended to correct unwarranted discrimination between localities, in determining cases arising under that section a consideration of matters arising under the first section, and which should be inquired into under a proper complaint or order for investigation in respect thereto, would be entirely irrelevant and immaterial.

It should be borne in mind in seeking a proper construction of Section 4 that the Commission has possessed since 1906 comprehensive power and authority to correct unjust and unreasonable rates and to prescribe just and reasonable rates after a full hearing upon a complaint, and since 1910 also upon an order for an investigation on its own initiative.

This is fully covered by Sections 1, 13 and 15. When the fourth section was being amended in 1910 no question was made as to the efficacy of those sections for the accomplishment of the purpose thereby sought.

Again, Section 1 involves merely the inherent reasonableness or unreasonableness of a charge for a given service and does not involve any question as to its discriminatory nature, as compared with charges for other services. This view seems to be taken also by counsel for the Chicago Association of Commerce, who in their brief emphasize the absolute impracticability of the Commission's investigating the reasonableness of each of the specific rates involved in the more than 5,000 applications which are shown to be pending before it.

In acting in pursuance of the first section, the Commission would be obliged first to find that particular rates claimed to be violative thereof were unreasonable in and of themselves, and would then prescribe maxima to be charged thereafter.

(c) *If, to sustain the validity of the amended fourth section, recourse must be had to other provisions of the statute to find the principle or standard which is to guide the Commission in the determination of applications, then the principle of the third section alone is pertinent or furnishes any such guide or standard.*

We have shown that under an investigation had by virtue of an application of the carrier, under the fourth section, the provisions of the first section are not relevant or material. Neither are the provisions of the second section pertinent because that section only refers to discriminations between shippers and cases where the service of transportation is similar.

The third section is aimed generally against unlawful discriminations as between localities by forbidding the giving to one locality of an undue preference whereby another locality will be subjected to an undue prejudice. That section is general in its operation, applying to localities whether upon the same line of the particular carrier or not. In a complaint by a shipper or a locality, under that section, or an investigation ordered by the Commission thereunder, the burden of justification is not upon the carrier.

The fourth section is specific and is aimed at cases in which there is a seeming, or *prima facie*, discrimination as between localities by reason of the fact that the service to one locality is somewhat greater than that to the other while the charge is less.

In speaking of that section, Mr. Noyes, in his work on American Railroad Rates, says, on page 111:

> "This section makes a particular application of the general inhibition in the third section against the giving of any undue or unreasonable preference or advantage to any person or locality. It was separately stated in the Act on account of the popular feeling against the especial form of discrimination prohibited. It stated no new rule."

The Commission, however, distinctly found that the circumstances and conditions operating in respect to the adjustment of rates at the coast were quite dissimilar to those appertaining at intermediate points; that competition operated to reduce rates to the coast; that such competitive factors did not operate to reduce the rates to the respective intermountain points.

Under either section, however, competition has always been regarded as a potent factor, where it existed, in

justifying the carrier in making a lower rate for a longer haul to a competitive point than for a shorter haul to a non-competitive point, or in apparently favoring the competitive point in its adjustment of rates, while such favor was not extended to the non-competitive point.

Interstate Commerce Commission v. *L. & N. R. R.*, 190 U. S. 273.

East Tennessee, Virginia & Georgia Ry. v. *Interstate Commerce Commission*, 181 U. S. 1.

As tersely stated by this court in *Interstate Commerce Commission* v. *Chicago Great Western Railway Co.*, 209 U. S. 119:

> "In fixing their own rates they (the carriers) may take into account competition with other carriers provided only that the competition is genuine and not a pretense."

Of course, under the fourth section, prior to its amendment, upon complaint of a shipper or locality of an alleged violation of the provisions of that section, the burden was upon the complainant to show a lack of justifying circumstances and conditions. It may be admitted that the purpose of the amendment of that section was to throw the burden and necessity upon the carrier to make an application which, under the old law, was permissible, but not necessary, and that by striking out words which vested the initiative in the carrier the burden is now placed upon the carrier to justify the making of a lower rate for a longer than for a shorter distance over the same line in the same direction. That justification, however, is shown when it appears that a lower rate is made as a matter of competition—that the rate to the more distant point would be controlled by conditions not operating at the intermediate point or points. The de-

gree of competition between carriers existing at the coast point and which does not exist at the nearer point is a justification by which lower rates are charged at coast points, and demonstrates that the action of the carriers does not give to the more distant point an undue preference or subject the intermediate points to an undue prejudice, because the preference and the prejudice are due to the most potent factor operating in the adjustment of rates—namely, competition. See:

Peavey & Company v. *Union Pacific R. R. Co.*, 176 Fed. 424, 425; affirmed by this court in

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 48.

L. & N. R. R. Co. v. *Behlmer*, 175 U. S. 648.

East Tennessee, Virginia & Georgia Ry. Co. v. *Interstate Commerce Commission*, 181 U. S. 1.

The construction which this court has always placed upon the third section and which must obtain also in construing the fourth section, if that section is to be sustained, is not affected by any subsequent legislation of Congress is apparent from the recent ruling of this court in *Interstate Commerce Commission* v. *Diffenbaugh, supra.*

Not only did the Commission find that the terminal rates were made lower than the intermediate rates because of the competition at the coast, but it may be even urged that in respect to an adjustment existing at the time of the passage of the amendment to the fourth section there was a presumption in favor of that adjustment and it may be doubted whether the burden was upon the carrier to do more than explain the same by showing the existence of competitive conditions. But wherever the burden may be, there is no dispute as to the

facts which amply justified the making of the terminal rates lower than those of intermediate points.

Of course if the amended fourth section be held unconstitutional, then the old fourth section unamended remains in full force and effect. In that event the applications of the railway companies should be treated as made thereunder, as would have been proper if the carriers did not care to assume the risk of being penalized should they not be able to justify in a criminal prosecution a rightful departure from the rigid rule of the section by showing dissimilarity of circumstances and conditions. An order of the Commission denying such applications under the undisputed facts showing the existence of competition creating dissimilarity of circumstances and conditions between two points involved would be clearly erroneous and invalid.

The Commission itself in its first opinion in the Spokane case expressly held that the existing adjustment was not in violation of Section 3.

(15 I. C. C. Rep. 388.)

The effect of this action of the Commission in these cases would be to restrict competition between rail carriers against water carriers as well as competition between the rail carriers themselves in respect to terminal rates and transportation to terminal points.

A discrimination between localities is just when the advantages of the one place over the other produce conditions which render discrimination by the carrier necessary in order to obtain traffic.

In such cases there is no unlawful discrimination within the meaning of the Act and there is nothing then condemned by the Act. In fact such action of the carrier

does not fall at all within the invidious designation of discrimination.

Noyes on American Railroad Rates, pp. 90, 91. See also pages 93 and 94.

On page 94, he states:

"The statement that low rates at competitive points impose heavier burdens upon local traffic is fallacious. The railroad could not get the through traffic at all unless it made low rates. Unless carried at an actual loss—impossible from an economic standpoint—it does the local traffic no harm. If it pay any profit—although insufficient to contribute to fixed charges—it reduces the amount necessary to be raised from local shipments. Low rates at competitive points by producing paying business not otherwise obtainable, in the end benefit the local traffic by enabling the railroad to reduce the rates thereon. Moreover a reduction of through rates to a competitive point generally benefits the surrounding territory. The low through rate to the distributing centre *plus* the local rate to the near-by station is often less than the regular rate to that station even though it be nearer the shipping point than the distributing centre."

On page 112, he continues:

"A statute absolutely denying to a railroad the right to charge the less for the longer haul, while seeming just at first glance, would contravene those elementary principles which we have considered. Charges could no longer be based upon the value of the service. A railroad must take business from competitive points at competitive rates; and if it cannot charge intermediate traffic proportionally more it must, often, go into bankruptcy. And if it must subsist upon the local traffic alone the same result is likely to follow. Instead of the railroads losing money on long hauls, and making it up on the short, whatever is received from through traffic above the additional expense of earning it is extra and

goes that far toward maintaining the railroad. Inequalities in charges in favor of the long haul manifestly constitute discriminations between localities; but they are not unjust unless the differences in charges fail to correspond to differences in conditions."

To deprive a rail carrier of the right to compete with other carriers to secure traffic for movement to a competitive point injures such carrier without benefiting the non-competitive town on its line. The recognition of the force of competition is but the recognition of a natural economic law. Where the competition is open the communities at large have the benefit of the working of such natural law, and an adjustment of business conditions in accordance with such law is in consonance with reason and more apt to stand than an arbitrary or artificial adjustment made by some commission.

In the learned opinion of Judge MACK in disposing of these cases he pertinently says:

"While the primary question in the E. T., etc., Ry. Co. case, *supra,* was as to the right of the carriers, in the first instance and without application to the commission, to make lesser rates for the long than for the short haul, inasmuch as the original complaint charged a violation of both the third and the fourth sections, the court necessarily considered section 3, and held that it could not be violated by making a lesser charge for the long than for the short haul, if the long-haul rate was forced by competition and was not unremunerative.

This construction of section 3 was not dependent upon the clause in section 4 which, by the amendment of 1910, has been stricken out. It was based upon the language of section 3 itself, which forbade not any preference but only an undue preference, and upon the determination that, in the nature of things, there could be nothing undue in a preference which

was caused by the natural geographical situation, and which would continue even if there were no railroad carriage. The amendment to section 4, therefore, has not changed the construction of section 3, and it follows that no unjust prejudice to Spokane and other interior points can now be predicated merely on the fact that the rate from any of the eastern territory is less to the Pacific coast terminals than to the intermediate points." (Printed Rec., 344, in Case 883.)

It follows from the foregoing that satisfactory proof that the making of a lower rate to the more distant point is controlled by competition not existing and therefore is proof of not controlling at the nearer point, such a dissimilarity of circumstances and conditions as to require the granting of the application of the carriers for relief from the rule of the fourth section. That, of course, would not preclude the Commission from inquiring at any time afterwards, either upon complaint or upon its own order, into the question as to whether or not Sections 1 or 3, or any other section of the statute, were being violated at the time of such inquiry, or as to whether or not the permission granted on the application under the fourth section was being abused by some action taken, resulting in the violation of some other section.

The carriers having established the right, as a matter of transportation necessity, to carry lower rates into the competitive territory, are entitled thereafter to initiate and establish such rates as competitive conditions in that territory require and are further entitled to the presumption that in the exercise of this right they will exercise it in accordance with all other mandates of the Act. If, in the exercise of that right, the carriers should violate any other provisions of the Act they would be

amenable to correction on complaint of shippers or by initiation of investigation by the Commission.

What is intended to be the nature of the application of the carrier in special cases for authority "to charge less for longer than for shorter distances for the transportation of passengers or property?" Evidently it was intended that such application should present special cases showing a good reason or justification why the general prohibition in the enacting clause forbidding a greater charge for shorter than for longer distances over the same line in the same direction, the shorter being included within the longer distance, should not apply. It was not intended that every time a carrier changed its rates at any of the points it should first go to the Commission for authority to justify such change. The initiation of rates is still left with the carriers. It was simply intended that in the above application the carrier should, upon showing a just reason why the rigid prohibition of the section should not apply, be relieved generally in respect to the localities stated from the operation of the general rule. Therefore, in such application it would not be necessary for the carrier to state what particular lesser charge for longer than for shorter distances it desired to make, because evidently such charge would be dependent from time to time upon the amount or degree of competition at the more distant point.

In other words, an application under the proviso of the fourth section for permission in special cases to "charge less for longer than for shorter distances" is intended to be general—showing that in the particular cases stated the prohibition of the section should not apply and asking that the carrier be relieved from the operation of such prohibition.

(*d*) *The order of the Commission is erroneous because it does not give full effect to water competition existing at the Pacific terminals, so as to allow carriers west of Zone Two to meet this competition, nor permit the making of rates low enough to allow shippers west of this Zone to have their freight moved to Pacific terminals in competition with freight borne by water from the Atlantic to the Pacific seaboard.*

The Commission recognized the effect of water competition only as it is caused by the existence of a water route from the point of origin of the traffic to its destination and is reflected into the interior from the Atlantic seaboard. It did not give effect to the compelling force of that competition as it exists only at the Pacific terminals. It has made a rule, not to be departed from, that from Chicago no rate more than 7 per cent. above the terminal rate shall be charged to intermediate points, and that from Missouri River no intermediate rate shall be higher than the terminal rate; the holding is that water competition, existing in greatest force at New York, gradually diminishes toward the west until, when it reaches Chicago, it is slight and when it reaches the Missouri River is entirely exhausted. This conclusion overlooks the rule that no construction should be given a statute which will defeat its manifest purpose.

Manufacturers on the Missouri River, in Chicago and on the Mississippi River compete with manufacturers of the same commodities in New York. These commodities can move from New York to the Pacific coast by water. Though they cannot move from Chicago or Missouri River by water, they have to meet at the terminals the effect of water competition just as truly as if there was

a waterway from Chicago to those terminals. In meeting this competition the rate from Chicago to the terminals must be substantially the same as the rate from New York, and the rate from Missouri River to the terminals must be substantially the same as the rate from New York or Chicago. But the effect of the order is to forbid manufacturers at this point to meet the rate from New York unless the intermediate rate, although reasonable in itself, is reduced to the same amount. This construction defeats the manifest purposes of the law, and if it is to stand we must impute to the lawmaking body the intention to make a law discriminatory in favor of New York against Chicago and points on the Mississippi and Missouri Rivers—a law which, instead of fostering commerce, tends to strike it down. We think it may safely be laid down as a rule that where the point of destination may be reached by water carriers, all freight moving there has to meet the competition of water whether it originates at a place from which it might be borne by water, or at a point remote therefrom, and that the law intends that the rate from the inland point may meet this competition without any prejudice to intermediate rates. This proposition was clearly affirmed in *L. & N. R. R.* v. *Behlmer*, 175 U. S. 648.

(*e*) *Under the fourth section the Commission is without power to fix differentials between the intermediate and the terminal rates.*

The Commission proceeded to fix the relation of the intermountain rates to the coast or terminal rates and prescribed the differential. It assumed to act under the following provision in the fourth section:

"The Commission may from time to time pre-

scribe the extent to which such designated common carrier may be relieved from the operation of this section."

What may the Commission prescribe from time to time as "the extent to which such common carrier may be relieved from the operation of this section"? One meaning, as stated by Mr. Commissioner Prouty, is to define the territory from which the higher intermediate charge may be made—that is, to prescribe the distances or points along the given line in respect to which the rigid rule of the section is not to be operative. That would cover the geographic extent.

The clause in question immediately follows the clause by which a carrier may be authorized to "charge less for longer than for shorter distances," that is a clause which refers in general terms to "distances."

Another meaning may well be a power to prescribe the extent of the traffic which is to be relieved from the operation of the section—that is, the character or kinds of traffic. Thus, it appears in this case that competition forced the rail carriers to take certain articles out of the usual classes and give them special commodity rates, because such articles came in competition at the coast with those carried by water. As to other articles, such adjustment was not necessary and they remained in the regular classes subject to the usual class rates to the coast.

Again it might be shown that freight traffic alone was affected by competitive factors at the more distant point while passenger traffic would not be. Thus, passenger traffic by rail to any point on the coast would not be effected to any appreciable extent by competition of water lines owing to difference of time and conveniences. So

the Commission might well prescribe that freight traffic was not subject to the rigid rule, but no reason existed for giving relief therefrom as to passenger traffic.

Therefore, by determining what articles or character of transportation should have a lower rate to the coast, the Commission would prescribe the extent to which the carrier would be relieved from the operation of the rigid rule of the section. But the Commission also suggests that the authority may be exercised by prescribing the maximum difference which may be made against the intermountain point or by fixing a rate at the more distant point below which the carrier must not go. It is unnecessary in this case to consider that suggestion, because, if it were assumed to be correct, yet, evidently, where it appears, as in this case, that the lower rate to the more distant point is made as a matter of competition and by virtue of a force not operating at the intermediate point and as long as such forces operate at the one point and do not operate at the other, it would not be proper to fix an absolute minimum or to fix the difference which should exist in respect to the rates to the respective points. Assuming the rate to the intermediate point to be just and reasonable in itself, if the Commission were to prescribe the maximum difference which might be made at the competitive point, it would be clearly prescribing the extent to which the carrer might go at that point in competing for business—and this it has no power to do.

The operation of the section is a prohibition against charging more by any amount for a shorter than for a longer haul over the same line in the same direction. Relief from the operation of that section is relief from a hard and fast rule that no more shall be charged for the

short than for the longer haul. That provision was always in the section from the date of its enactment. Under it at one time the Commission assumed, as in this case, while finding competition at the more distant point, the above provision to be a justification for it to fix the relation of the rates to the two points involved. See report of Mr. Commissioner Prouty in the *Spokane Case* (21 I. C. C. Rep. 407, 408.)

Such an order was made in the *Danville Case* (8 I. C. C. Rep. 409), and in the *City of Hampton Case* (8 I. C. C. Rep. 503).

These orders were set aside by the Circuit Court of Appeals.

Interstate Commerce Commission v. *N. C. & St. L. Ry.*, 120 Fed. Rep. 934.

Interstate Commerce Commission v. *S. Ry.*, 122 Fed. Rep. 800.

Lack of such authority under that provision was also recognized by this court in *East Tennessee, Virginia & Georgia Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1.

The reason is obvious. The reasonableness of a rate to a given point must be determined in and of itself and not as related to or dependent upon a rate made to another point to meet different circumstances and controlled by different conditions and which may well be made less than otherwise would be reasonable.

It is also well known that on several occasions bills have been introduced in Congress to empower the Commission to fix differentials, but the same have always failed of passage. It would be indeed an enormous and dangerous power.

In its Twenty-fifth Annual Report to Congress, dated December 20, 1911, the Commission, in commenting on the ruling of the Commerce Court in these cases, says, on page 34:

> "In what way can the Commission give effect to its conclusion? It cannot fix a rate from New York to San Francisco below which the rail line shall not go, for it has no authority to fix a minimum rate."

This view is rather inconsistent with that expressed by the Commission in its report on the Spokane Case (21 I. C. C. Rep. 415), as follows:

> "This authority can be exercised by prescribing the maximum difference which may be made against the intermediate point or by fixing a rate at the more distant point below which the carrier must not go, or by defining the territory from which the higher intermediate charge may be made."

We do not make this quotation to show our concurrence with all the views expressed therein, but rather to show that the Commission now seems to think that the view expressed in its report or opinion was not correct.

The fact that it would have no authority to fix, literally speaking, a minimum rate is but a statement of half the truth and, therefore, misleading. It has ample authority under the law in an appropriate case and by an appropriate order to prevent a carrier from unduly favoring one locality at the expense of another, and, in an appropriate case, where the evidence and facts justify, it may deny the application of a carrier for permission to make lower rates for longer than for shorter hauls over the same line in the same direction. Or if after granting such application for dispensation from the rigid rule of the section it should be afterwards found and determined that the right was merely exercised so as to violate some other

section of the Act, such violation could be readily corrected by an appropriate order. Thus, if the evidence should warrant and the Commission should find that a lower rate fixed by the carrier to the more distant point even after the granting of its application, is not made as a competitive matter, but merely as a matter of undue or unwarranted favoritism, the Commission might condemn the adjustment and enter an appropriate order requiring the carrier to remove or correct any undue discrimination and cease from a violation of any of the other sections as the case might warrant.

Again, if the evidence should warrant and the Commission should find that a rate to the more distant point named in the application, if any should be suggested, though made as a matter of competition, yet would not pay the mere cost of car haulage—which would be unusual—and thereby cast an unjust burden upon other traffic to make up an actual loss, the Commission might well decline to grant the authority.

Beyond this it was not intended that the Commission should prescribe or regulate the extent to which one carrier might compete against other carriers for transportation business. As long as the competition is open and above board the carrier is exercising its rights in accordance with the law and is not subject to restraint in that respect by the Commission, because it is merely exercising a right in accordance with the policy of the law as evidenced by the Anti-Trust Act and the anti-pooling clause of the Interstate Commerce Law. (See also 209 U. S. 119.)

But as the Commission found that the rate to the Pacific coast was controlled and forced as low as it was

by competition which did not exist at the intermountain points, it therefore appeared that the maintaining of such lower rate to the coast was not violative of any provision of the Act and therefore it was improper for the Commission in this case to attempt to prescribe a relation of the rates even if the statute granted them such power.

(*f*) *The Interstate Commerce Commission is a subordinate governmental body. It is a rule of construction that the statute creating a subordinate governmental body and clothing it with powers is strictly construed against the body thus created and it is incumbent upon whomsoever contends for such power in such a body to justify the contention by pointing out the clear and unequivocal language granting the power.*

Interstate Commerce Commission v. *Railway Company*, 167 U. S. 479.

Interstate Commerce Commission v. *Harriman*, 211 U. S. 407.

Burnham-Hanna-Munger Co. v. *C. R. I. & P. Ry. Co.*, 218 U. S. 88.

On page 41 of its Twenty-fifth Annual Report, December 20, 1911, the Commission concludes in respect to this power, as follows:

> "Congress might by direct enactment prescribe this relation or it might apparently delegate that duty to some subordinate tribunal. It has been the understanding of this Commission that by the amendment of 1910 Congress endeavored to devolve upon us this duty.
>
> It may be said that the responsibility and the power thus cast upon this Commission by such an interpretation of the Act is an enormous one, and this is true; but that authority must be exercised by

some one. This Commission is a creature of Congress; it reports and acts immediately under Congress. If its decisions do not comport with the public weal, it rests with Congress at any moment to alter the constituency or the method of procedure of this Commission, or Congress may interfere by direct enactment, in each and every situation upon which the Commission passes."

That, however, is no argument that such enormous power has been delegated. Certainly it was not delegated by the amendment of 1910 to the fourth section because the language of the section in that respect is the same as it has always been.

Again, the fact that Congress might afterwards correct a wrongful regulation and prevent for the future a wrong done by the Commission is no argument, because by the time Congress might act incalculable injury would have been done. The power claimed is enormous and we should be able to find in some plain wording of the statute authority to exercise it.

That the delegation of such powers as contended for by the Commission is not to be implied, is well evidenced by the following language found in 167 U. S. 479, 505, 506, 507, 511, *supra:*

"The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance.

That Congress has transferred such power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. * * * If Congress had intended to grant such a

power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. * * *

The grant to the commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the commission. * * *

Our conclusion, then, is that Congress has not conferred upon the commission the legislative power of prescribing rates either maximum or minimum or absolute. As it did not give the express power to the commission it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just."

IV.

The Commission erred in disposing of the Fourth Section applications and the Spokane Case by fixing certain arbitrary differentials between the terminal rates and the intermediate rates, because this prevents meeting the competition at the terminal points and the maintenance at the same time of rates reasonable in and of themselves at the intermediate points.

We have thought it wise to discuss at considerable length the legal questions involved in these cases. In doing this, we have given our views as to what is the true

construction of the fourth section and have urged upon the attention of the court some legal propositions which the court may not find it necessary to pass upon in the disposition of the appeals; but they are pertinent and important and we feel this has warranted the discussion of them.

Two propositions, flowing from the legal principles discussed, which cannot be denied, are, first, that the true intent and meaning of the fourth section and its proviso is to permit the carrier to charge a rate sufficiently low at the terminal point to meet the competition with which it has to contend there; second, that it has the right to charge a rate reasonable in itself at the intermediate point. If either of these rights is destroyed by the percentages fixed between the intermediate rates and the terminal rates, the orders fixing them are invalid. That adjusting their rates according to these percentages will deprive the carriers of one of these rights we think is demonstrable. In our opinion the effect of the orders is (*a*) to overthrow the first section, in that they deprive the carrier of the right to receive a reasonable rate at the intermediate point, where competitive forces do not exist, unless it abandons the right to accept less than a reasonable rate at the terminal point, where competition forces such rate; (*b*) to import into the third section a meaning not warranted by the law, in that they make the charging of the lower rate at the terminal point undue discrimination against the intermediate point if the rates exceed the fixed percentage, although the intermediate rate is no higher than is inherently just and reasonable, and the rate at the terminal point no lower than necessary to meet the competition there; (*c*) to nullify the meaning of the fourth section, which is to

permit a rate to be charged at the terminal point sufficiently low to meet competition there without being made to depend on the rate at the intermediate point; (*d*) to dispose of pending complaints for the establishment of just and reasonable rates at various intermediate points without finding the rates complained of to be unreasonable or prescribing in lieu of them rates found to be reasonable.

In its report in the Spokane case, 21 I. C. C., p. 426 the Commission says:

> "It should also be noted that this is not a new and additional authority, but is simply the exercise of the jurisdiction provided for in the fifteenth section for the correction of unjust discrimination. There is no essential difference between this order and an order which the Commission might make under the third section."

At page 404 it says:

> "On June 18, 1910, subsequent to the promulgation of the foregoing opinion, the fourth section was amended. The City of Spokane claims that the amended section now in express terms forbids the discrimination against which that locality has always protested. It seems proper to inquire, therefore, whether, under that section in its present form, this discrimination is forbidden or can, if found to exist, be corrected by an order of this Commission. In this view we caused the applications of carriers for leave to depart from the rule of the fourth section in the making of these transcontinental tariffs to be assigned for hearing and argument at the same time with these and cognate cases. The questions presented under those applications have been elaborately discussed; additional testimony has been heard, and the whole matter is now before us for disposition. In disposing of it we have to inquire:
>
> 1. What is the duty and authority of the Commission under the present fourth section?

2. *Can the Commission under that section make an order in one or both of these cases which will obviate the necessity of prescribing a schedule of reasonable rates?*"

We have italicized the second question put by the Commission in order to direct special attention to it.

The Commission answered its second question in the affirmative and, so answering, disposed of the Spokane case by specific order under the fourth section in that case, and left the commodity rates complained of as unreasonable in themselves in the Maricopa and Nevada cases to be adjusted under its fourth section order, without disposing of these complaints. It likewise established a rule by which all other intermediate rates must be adjusted, though reasonable and uncomplained of. Was the Commission right in its answer? We think not.

In its twenty-fifth annual report the Commission, referring to the case of *E. T. V. & G. Ry. Co.* v. *I. C. C.*, 181 U. S. 1, says, reliance is placed on a case, *decided before the fourth section was amended*, for the establishment of the proposition that where competitive conditions demand the charging of a rate less than reasonable, the rate may be made sufficiently low to meet the competition and that this works no undue discrimination. But that case is as applicable to the present fourth section as it was to the old and the logic of the opinion is as inexorable today as it was on the day it was delivered. This court says if the competition be sufficiently acute at the terminal point, you may lower your rate there to any figure necessary to meet the competition, no matter how much it may be lower than the intermediate rate, without being guilty of discrimination; the Commission says, no matter what is the competition, you must not have your

terminal rate less than the intermediate rate except by an arbitrary percentage,—if you do, you are guilty of undue discrimination. The law says, and the court affirms, you may have your intermediate rate reasonable for the service you render; but the Commission says, you must carry to the intermediate point for a rate less than reasonable, if, to obtain a reasonable rate, you need to charge more than a given percentage above the terminal rate, forced by competition,—otherwise you are guilty of discrimination. Summed up, the decision of the Commission is that the terminal rate and the intermediate rate must bear to each other a certain fixed relation, measured by an arbitrary percentage, otherwise discrimination is wrought.

The Commission in substance declares: It is unnecessary to inquire whether the carrier is receiving a rate that is just and reasonable; it is unnecessary to determine whether the terminal rate is such as will permit the carrier to meet the competition; all that is required is to fix a certain relation between the intermediate rate and the terminal rate and leave the carrier to adjust its rates in accordance with this relation, although it may have either to elevate the terminal rates so high as to lose the traffic, or, else, lower the intermediate rates to a point where it is not receiving a reasonable compensation.

But we are told by the Government in its brief that the Commission found that the carriers might charge less at the terminals than at the intermediate points, and might, at the intermediate points, make rates higher by the fixed percentages than the terminal rates; that this is a finding of fact that the percentages represent differences between the intermediate rates and the terminal rates which will enable the carriers to obtain reasonable inter-

mediate rates and at the same time carry to the terminals at rates sufficiently low to meet the competition.

Unfortunately for this answer, it is refuted not only by the whole theory on which the orders are based, as shown by the opinions of the Commission, but even by the specific declarations of the opinions. We have seen above that the Commission avows that it is not necessary for it —is unnecessary even in answer to specific complaints— to fix a schedule of reasonable rates. What it did, what it professed to do, was to discard from consideration the question of fixing reasonable rates and, solely on the question of discrimination, to establish an arbitrary relation between the terminal rates and the intermediate rates. The effect of the orders is to make the terminal rate the measure of every intermediate rate. That it had it in mind to do this seems to be shown by the form of the order prescribed by it for making applications for relief from the fourth section, in which it is provided that there must be shown the highest charge which is desired to be maintained at any intermediate point. We think it is not technical to say there is an essential difference between the meaning of this form and the meaning of the law. The Commission's idea, confirmed by its action, was that the rate to the more distant point may be established and then all intermediate rates shall be based upon it by using the fixed percentages; the intent of the law, however, is that the rate to the intermediate point must be not more than reasonable in itself and the terminal rate may be as much less as the circumstances warranting the relief demand.

Again, the above finding of the Commission cannot have the effect claimed for it by counsel, because it permits the continuance of either the terminal rate or the

intermediate rate at the option of the carrier, and makes no independent finding as to the reasonableness of the intermediate rates, but permits the continuance of these rates if the terminal rates are raised, provided the percentages between the two conform to the orders of the Commission. What is said in *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 190 U. S. 273, concerning the order therein involved is very pertinent here. In that case rates to La Grange, and to points between La-Grange and Atlanta were made by the addition of the rate to Atlanta and the local rate back. The order was that no higher rate should be charged to La Grange than to the more distant points between it and Atlanta. The court held the order invalid because the Commission did not find the rates to La Grange unreasonable in themselves,—that the order that they should not exceed the Atlanta rates was not such a finding. The Court's language is:

> "A clause in the order of the Commission makes it clear that no independent finding as to the unreasonableness of the rates was made, since it allows the carriers to continue to charge the rates complained of to La Grange, provided no higher rates were charged to the more distant points between there and Atlanta. The inconsistency between such order and the conclusion that the rates to the shorter distance point were unreasonable *per se* was pointed out in *E. T. V. & G. Ry. Co.* v. *I. C. C.*, 181 U. S. 1." p. 284.

That the Commission intended that the terminal rate should control the intermediate rate is made plain by the very quotation embodied by the Government in its brief at page 32. The Commission is quoted as saying:

> "It should be ever borne in mind that the acute complaint in this case *is the discrimination and not*

the unreasonable rate. Obedience to this order will doubtless result in some rates from the East which are higher and in others which are lower than those suggested by the Commission *since we did not then feel at liberty*, as the complainants requested, *to make the Spokane rate depend upon the coast rate.*"

The thing the Commission did in its original order in the Spokane case was to make rates professedly reasonable in themselves. It says that at that time, since (as was shown in its original opinion) the coast rates did not discriminate against Spokane, it had no power to make the Spokane rate depend on the coast rate; but its declaration is that it may now make the Spokane rate so depend, and that while the percentages by which the dependence is established will result in rates at Spokane which in some instances are higher, in others lower, than reasonable in themselves, still the percentages are to govern and the question of reasonableness is to be eliminated. But the first section and the third section are just as potent now, as much to be abided by, as they were before the amendment of the fourth section; and it surely cannot be held that that amendment,—the mere omission from the section of the words, "under substantially similar circumstances and conditions,"—has so modified the law that, although the terminal rate does not cause any undue discrimination, (and if it did not before the amendment it does not now), and although the intermediate rate is no more than is just and reasonable, yet one or both rates must in a measure be abandoned and an arbitrary relation, to a degree destructive of both, maintained.

That water competition exists at the terminals and is of compelling force is found by the Commission. At page 416 of the opinion in the Spokane case it says:

> "This question of fact has been often considered in the past and with but one unvarying result. The Circuit Court of the United States has twice found, once in a proceeding concerning these very rates to Spokane, that active water competition does exist which *controls* the coast rate. * * * This Commission has repeatedly found and recognized the same fact."

Full effect must be given to the controlling force of the competition thus engendered, and, at the terminals, full play permitted to the proviso of the fourth section in relief of the carriers; in the interior, where the compelling force of the competition is wanting, full play must be given to the law which declares the right in the carrier to charge a reasonable rate. Neither right thus secured must be destroyed by the other, nor may the Commission bind them together by the third section, or otherwise, so that either will be ineffectual. When anything of this kind is attempted, no part of the law does its perfect work, but the several parts strive for their mutual destruction. In the case from 181 U. S., above referred to, where it was contended by counsel that dissimilarity of circumstances and conditions, brought about by competition at the place of destination, might not warrant the charging of a less rate than at the intermediate point, under the proviso of the fourth section, because it might work a preference or discrimination against the intermediate point, Chief Justice WHITE said:

> "True it is that all of the provisions of the statute must be interpreted together, and because this is the elementary rule the argument now pressed upon our attention is unsound. If it were adopted, it would follow of necessity that competition could never create such a dissimilarity of circumstance and condition as would justify the lesser charge to the competitive point than was made to the non-competi-

tive point. This would be the inevitable consequence, since under the view which the argument assumes it would be impossible for the lesser rate to prevail to the competitive point without creating a preference in favor of that point, and without giving rise to a discrimination against the non-competitive point to which the higher rate was asked. Thus the reasoning conduces to the deduction which it is advanced to refute; that is, the assumption that the statute at one and the same time expressly confers a right, and yet specifically destroys it. This is plainly the consequence flowing from the argument that competition, 'however forceful' it may be, cannot produce dissimilarity of circumstance and condition if discrimination and preference is held to necessarily arise from the charging of the lesser rate to the longer distance competitive point.

It is not difficult to perceive the origin of the fallacy upon which the contention rests. It is found in blending the third and fourth sections in such a manner as necessarily to destroy one by the other instead of construing them so as to cause them to operate harmoniously."

E. T. V. & G. Ry. Co. v. *I. C. C.*, 181 U. S., p. 17.

That the effect of the Commission's order will be to force the carriers to take rates less than reasonable at the intermediate points or raise the terminal rates to figures higher *than they may be* and meet competition is apparent from the allegations of the petition, admitted by the motion, from the undisputed facts contained in the affidavits and from the Commission's findings. The affidavits prove, the motion admits, and the Commission finds that the terminal rates, while less than reasonable, have been made as high as the competition allows. The declaration of the Commission above quoted is:

"The court * * * has twice found * * * active water competition does exist *which controls*

> *the coast rate.* The Commission has repeatedly found and recognized the same fact."

So, under the finding of the Commission, the coast rate has been controlled by water competition, is controlled by it and exists as a rate so made and governed. It, hence, follows that every rate which is raised will by so much cause a diversion of the traffic to the sea. An order of the Commission bringing about this result is violative of the law.

Under the specific declaration of the Commission that water competition *controls* the coast rate, not to speak of the necessity of drawing this conclusion from many expressions used by it, it is singular to find counsel for the Commission saying in his brief, p. 44:

> "And this finding" [that is, that the Commission did not find the intermediate rates to be unreasonable *per se*, or the terminal rates to be unremunerative] "necessarily included a finding that the rates to the long distance points were not fixed by circumstances over which the carriers responsible for the disparities had no control."

He repeats his erroneous conclusion at page 50, where he asserts that the Commerce Court erred in interpreting the opinion of the Commission as finding that the terminal rates were fixed by circumstances and conditions beyond the control of the carriers.

In the Salt Lake case the Commission established rates as reasonable in themselves which are now in effect. The affidavits of Mr. J. A. Munroe, Rec., p. 255, and Mr. G. W. Luce, Rec., p. 227, are very serviceable. They demonstrate beyond question that it is impossible to abide by the Commission's order, obtain a rate reasonable in itself in the interior, and at the same time meet the competition at the terminals. It would consume too much

time to go into the affidavits at length, but we may take illustrations enough from them to make incontrovertible the truth of this statement.

From the affidavit of Mr. Munroe the following appears: The present rate from Chicago to the terminals on duck, denims, drills, sheeting and bagging is $1. The Commission established a rate of $1.10 on these articles from Chicago to Utah common points. Under the percentage fixed by the Commission in its fourth section order the rate must be made $1.07 unless the terminal rate is raised. Here, then, is the finding of the Commission that the rate of $1.10 is a reasonable rate for the service rendered, its finding that the terminal rate is water compelled; yet the carrier must raise this water compelled rate or else reduce the intermediate rate to a point less than the Commission itself has declared to be reasonable. But this is not all. Salt Lake City is about 800 miles inland from San Francisco. The carrier, of course, is entitled to increase its charges as the distance from Salt Lake City to the coast increases. But under the Commission's order, if the terminal rate is not raised, not only must the carrier install a rate of $1.07 to Salt Lake City, 3 cents less than the Commission has found to be reasonable, *but must carry this rate substantially 800 miles through all successive intermediate territory* until it meets the coast rate of $1, plus the local back. Other illustrations are given by Mr. Munroe, but we need not pursue them.

A table in the affidavit of Mr. Luce is made this way: The Commission in the Nevada case established certain class rates to what is called the Winnemucca Group and certain other class rates to what is called the Reno Group. It very correctly established higher rates to the

Reno Group than to the Winnemucca Group, the former embracing the more distant points. For example, the first-class rate from Omaha to the Winnemucca Group is $2.38, to the Reno Group $2.50; the fourth-class rate to the Winnemucca Group is $1.50, to the Reno Group $1.58. These rates were installed by the carriers and are now in effect. This table has been inserted by Mr. Luce and is here referred to to show the recognition on the part of the Commission of the principle, which, indeed, could not be denied, that a rate reasonable in itself calls for a higher charge for the greater distance. In the table the average distance has been taken from Chicago, Mississippi River and Missouri River to the Reno Group and the Winnemucca Group, and the actual distances to the City of Reno and to the City of San Francisco. Some twenty representative commodities have been used for illustration and the specific rates established by the Commission at Salt Lake City have been used as reasonable rates to that point. It has been calculated what would be reasonable rates at the further points based on mileage, using the Salt Lake City rates as a basis. It may be said that the rate would not increase directly with the mileage, as there should be something less per ton per mile as the distance increases. This criticism is just, but as the distance increases there should, of course, be a substantial increase in the rates and adopting the increase in direct proportion to the mileage increase illustrates the point we are making just as truly as if we could figure out exactly what the increase ought to be.

Now let us see where the orders of the Commission land us: Sugar bags from Chicago to Salt Lake City, under its order, will carry a rate of 90 cents. This rate, being considered as reasonable in itself, ought,

in direct mileage increase, to make a rate to the Winnemucca Group of 104 cents; to the Reno Group of 117 cents; to Reno of 122 cents, and to San Francisco of 138 cents. But the present rate to San Francisco is only 90 cents, being forced to that figure by water competition. No higher rate than this can be made from Chicago to Salt Lake City. Going west this rate may be graded up only until 96.3 cents is reached; so that while to the Winnemucca Group, making every possible allowance for the decreasing per ton mile rate with the increasing distance, the rate to that group surely ought to be over 100 cents, rising to a still higher figure at the Reno Group, it can be only 96.3 cents to the Winnemucca Group and must be carried westward at that figure about 400 miles until it meets the coast rate increased by the local back, unless the coast rate shall be raised with consequent loss of traffic.

The table gives many other examples, but this is sufficient to illustrate our position and to show the unlawfulness of tying the intermediate rate to the terminal rate by fixed percentages.

Very applicable to the Commission's attempt to adjust all terminal and all intermediate rates by the establishment of a set of arbitrary percentages is the language of the court in *Texas & Pacific Ry.* v. *I. C. C.*, 162 U. S. 197. There the Commission had entered this order: "Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent country, is required to be taken on the inland tariff governing through freights." (P. 102.) The Court announced the rules which must govern the Commission in making its

orders, showing that it must be governed by the purpose of the act, which was to promote and facilitate commerce; that it must consider all the circumstances and conditions reasonably applying to the situation; that among the circumstances and conditions to be considered was competition that affects rates; that if the Commission proposed to promulgate general orders which should become rules of action to the carrying companies, the spirit and letter of the act required that such orders should have in view the purpose of promoting and facilitating commerce and the welfare of all to be affected, as well the carriers as the traders and consumers of the country. Many other things were detailed as necessary to be regarded by the Commission. This court then said:

> "It may be said that it would be impossible for the Commission to frame a general order if it were necessary to enter upon so wide a field of investigation, and if all interests that are liable to be affected were to be considered. This criticism, if well founded, would go to show that such orders are instances of general legislation, requiring an exercise of the law-making power, and that the general orders made by the Commission in March, 1889, and January, 1891, instead of being regulations calculated to promote commerce and enforce the express provisions of the act, are themselves laws of wide import, destroying some branches of commerce that have long existed, and undertaking to change the laws and customs of transportation in the promotion of what is supposed to be public policy." (P. 234.)

It may well be inferred from the briefs of the Government and the Commission,—indeed, the conclusion legitimately flowing from positions taken by them, is, that the amendment to the fourth section has established a new measure of reasonableness for a rate; that it has in some manner modified the first section so that that section no

longer secures to the carrier a rate reasonable in and of itself for each service rendered. But such position is untenable. The first section is as effective now as it ever was. The carrier is as much entitled now as ever to have a reasonable rate in and of itself for each and every service, and what was a just and reasonable rate for a given service before the amendment is a just and reasonable rate now. That amendment has no strange power of necromancy to write new meanings into the first section.

The Government in its brief, and the Commission in its orders, base the right to ground the intermediate rate on the terminal rate and join them together by arbitrary percentages, on the words in the fourth section by which the Commission may prescribe "the extent" to which a carrier may be relieved from the operation of the rigid rule of the section. We have already discussed at some length what we believe to be the meaning of the word "extent," but even if it were admitted that we are wrong in our construction, even if it means much more than we believe it to mean, it by no means follows that it authorizes the Commission to fix a differential by which the carrier must be deprived either of the right of free competition at the terminal or of receiving a reasonable rate in the interior. If it be granted that the third section and the fourth section must be considered together, that in every instance in which the Commission passes on an application under the fourth section, it must likewise apply the principles of the third section, even then "the extent" means nothing more than that the carrier must not fix a rate at the terminal point which is lower than necessary to meet the competition there. If the carrier has a rate at that point which is only sufficient to meet that competition, there is no discrimination

against the intermediate point, no matter what may be the rate there. The intermediate point in a sense may be discriminated against if the rate there is unreasonable in and of itself; for, in a sense, every unreasonable rate discriminates against the point at which it is applied in favor of every competitive point which is granted a reasonable rate. But this would be true no matter what is the rate at the terminal point, whether low enough to meet competition, or whether reasonable in and of itself. The charging of a rate more than reasonable at the intermediate points is a violation of the first section and is to be corrected under that section. It cannot be reduced to a figure less than that of intrinsic reasonableness merely because the rate at the terminal point is fixed low enough to meet competition. Herein lies the fallacy of the Government in saying that the fixing of the percentages is the same thing as if the Commission had established a rate at the terminal point below which the carrier might not go. If it had established such rate, and had the power to do so, that rate would have been a figure sufficient to meet the competition. So long as the carrier should fix the rate at this figure or at any figure in excess of it there could be no undue discrimination against the intermediate point by the maintenance of this rate. But when the intermediate rate is made to depend on the terminal rate, no matter how that rate is fixed the intermediate rate must follow the terminal rate down, and the first section no longer furnishes the guide for fixing the intermediate rate.

With the Government taking the position we have pointed out it is not strange to find this language in its brief:

"Suppose it (the Commission) should fix a *maximum* rate of one dollar to the terminals, and a maximum rate of 7%, 15% or 25% additional to the interior points from the several zones designated by the Commission. In that event the order would be open to precisely the same criticism to which it is now subjected by the Commerce Court, because the carriers might be under such order—as it is said they may be under the present order—forced to reduce their rates to the terminals in consequence of the water competition, which would carry with it the rates to the interior points, and the extent of this forced reduction would be as much unknown to the Commission as it was when the present order was made."

We say it is not strange to find the Government advancing this argument, and yet it is strange. For, be it said with all due courtesy, it shows a misapprehension of the principles of the act which probably has led the Government into other illogical positions. It is too plain that the Commission cannot establish a *maximum* rate at the coast and then establish a rate at an intermediate point which shall be any percentage higher than the *maximum* at the farther point. The theory of the law is that the carrier is entitled to receive a reasonable rate for every service rendered, and the Commission may establish a rate as the maximum of reasonableness. Therefore, a maximum rate which the Commission might establish at the coast—the farther point— is a rate reasonable in and of itself, and, of course, a maximum rate reasonable in and of itself to any intermediate point—the nearer point —must be less than the coast rate.

The false conception of the act under which the Government is laboring is further shown by what it says on page 54 of its brief. We quote:

> "If a forced competitive rate at New York can be legitimately met by the carrier from St. Paul, why cannot a forced competitive water rate to Seattle be legitimately met by the carrier at Spokane? *And if it can be met by the carriers, it necessarily follows that it can be lawfully fixed by the Commission.*"

But it has been too often decided both by the Commission and the courts to need further remark now, that because the carriers may voluntarily meet competition they cannot be forced by the Commission to meet it.

V.

The Commerce Court Had Power, as incidental to its decrees setting aside and enjoining the orders of the Commission, to also, in the meantime, restrain the Government officials from prosecuting carriers for a violation of the Fourth Section of the statute.

It is contended, page 64 *et seq.*, of the Government's brief, that the Commerce Court had no power to restrain the Government officials from prosecuting the carriers for a violation of the fourth section. It will be observed, however, that the injunction order against the Government officials is merely incidental to the main decrees setting aside and enjoining the orders of the Commission as being invalid. Such incidental orders were appropriate and, indeed, necessary for the protection of the carriers in the meantime. As to the power of a court of equity and of the Commerce Court, as such, as incidental to its decree, to also restrain prosecutions for penalties for alleged violations of the fourth section, the case *Ex parte Young,* 209 U. S. 123, would seem to be sufficient.

We respectfully submit that the orders of the Interstate Commerce Commission challenged in these cases were erroneous, based upon a misconception of a proper construction of the Interstate Commerce law and were, therefore, invalid and properly set aside by the decrees of the Commerce Court and that such decrees should be affirmed.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

Nos. ~~885 and 928.~~ ~~480 + 513~~

UNITED STATES OF AMERICA ET AL.,
Appellants,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
Appellees.

Nos. ~~884 and 929.~~ ~~481 + 514~~

UNITED STATES OF AMERICA ET AL.,
Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

REPLY BRIEF ON BEHALF OF THE CHICAGO ASSOCIATION OF COMMERCE, ONE OF THE APPELLANTS.

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GUNTHORP - WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

Nos. 883 and 928.

UNITED STATES OF AMERICA ET AL.,
Appellants,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
Appellees.

Nos. 884 and 929.

UNITED STATES OF AMERICA ET AL.,
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vs.

UNION PACIFIC RAILROAD COMPANY ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

REPLY BRIEF ON BEHALF OF THE CHICAGO ASSOCIATION OF COMMERCE, ONE OF THE APPELLANTS.

I.

FINDINGS BY THE COMMISSION AND NOT THE ALLEGATIONS IN THE CARRIERS' PETITIONS ARE TO GOVERN ON CONTROVERTED QUESTIONS OF FACT.

On pages 27 to 29 of the carriers' brief we find

what are termed "fundamental and controlling propositions of fact deducible from the allegations of the petitions and *admitted by the motions to dismiss.*" Even assuming that these motions to dismiss are to be treated strictly as demurrers and that these "propositions of fact" are not mere conclusions but are well pleaded statements of fact, they cannot be held to be admitted on this record except in so far as they are in accord with the findings of fact made by the Commission in the orders and reports which are made part of the petitions filed by the carriers in the Commerce Court. This we would submit must follow from the doctrine laid down in the *Delaware & Lackawanna case,* 220 U. S., 235, the *Union Pacific case* decided in this court January 9, 1912, and the other cases there cited. If, as those cases hold, findings of fact made by the Commission when supported by any substantial evidence are conclusive on the courts it must follow that any allegations in a petition in conflict with such findings would have to be disregarded by the courts and therefore can be safely ignored by the pleader.

An analysis of these different "propositions of fact" discloses that while they are substantially in accord with the allegations of the petitions they are by no means in accord with the findings of the Commission. For instance, one of the most glaring departures of this character is found in proposition (f) to the effect that "rates from eastern defined territories to Pacific Coast terminals are *less than just and reasonable for the services performed,* * * *." This alleged fact is one of the cornerstones of the carriers' whole argument, and when

we find it repeated on page 103 of their brief it is given as a fact that is not merely admitted by the motion but also as having been proven by the affidavits and *found by the Commission.* The quotation that is there made from Commissioner Prouty's opinion merely states that water competition controls the coast rates. We would submit that it by no means follows from this that the rates are less than reasonable, and there is no statement to that effect to be found anywhere in either Commissioner Prouty's or Commissioner Lane's opinions. The Commerce Court said:

> "The Commission also found, however, that the present Pacific Coast rates from zone 1 have *not* been proven by the carriers upon whom the burden was laid to be less than reasonable *per se.*" (Rec., 883, p. 344.) See also Commissioner Lane's opinion (Rec., 883, p. 129).

We have enlarged somewhat upon this point because we think that it is characteristic of the entire argument of the carriers, and that both before the Commerce Court and this court they are seeking to invoke the judgment of the court on questions of fact as against findings by the Commission. This is illustrated by the affidavit of E. P. Ripley, President of the Atchison, Topeka & Santa Fe Ry. Co. (Rec., 883, pages 276 to 278), introduced by the carriers in the Commerce Court in which the affiant takes up seriatim many of the express findings of fact by Commissioners Lane and Prouty and attempts to show that such findings are not in accord with the true facts as known to him. We do not understand that the findings of the Commission made in the regular discharge of its duties can be

overruled in this manner. On page 85 of their brief counsel for the carriers contend that "the order of the Commission is erroneous because it does not give full effect to water competition existing at the Pacific terminals so as to allow carriers west of zone 2 to meet this competition nor permit the making of rates low enough to allow shippers west of this zone to have their freight moved to Pacific terminals in competition with freight borne by water from the Atlantic to the Pacific seaboard." This contention by the carriers we would submit constitutes an attempt on their part to attack and overrule in this court findings of fact by the Commission, and the same may be said of the entire argument found in part IV of their brief beginning at page 94. And it is to be observed that practically the entire argument of the carriers is an attempt to establish these very propositions of fact which at the beginning of their brief they state are *admitted* by the motions to dismiss.

II.

THE COURTS HAVE JURISDICTION TO SET ASIDE THE DECISION OF THE COMMISSION UPON THE APPLICATION MADE BY A CARRIER UNDER THE FOURTH SECTION ONLY IN CASE THERE IS SUCH ARBITRARY ACTION ON THE PART OF THE COMMISSION AS WOULD AMOUNT TO A LACK OF DUE PROCESS.

Counsel for the carriers at page 38 of their brief accuse us of "confusion of thought" on the question of jurisdiction, and at page 39 say:

"It is astonishing to find counsel speaking

> of the absence from our petitions of any averments of 'fraud or corruption' (I. C. C. Brief, page 15) or 'arbitrariness' (Chicago Brief, page 85) as though the presence of such averments would change the situation."

We would refer counsel to the opinion of Mr. Justice SHIRAS in the *Louisville & Nashville Ry. Co. case,* quoted in our original brief at page 83, where after stating that the carrier cannot complain in his application is denied he goes on to refer to the finality of the decisions of appraisers as being analogous, and says:

> "If there are charges of *fraud* or *corruption* the courts may consider them."

Perhaps we were not sufficiently plain in the language used in our brief, but we did state specifically at page 81 that it was the *"petitions here filed"* and the final decree here entered of which we claimed the Commerce Court had not jurisdiction, and at page 85 that "we do not contend that if the action of the Commission was purely *arbitrary* there would be no appeal * * * but that *subject to this limitation* we would submit the courts cannot interfere." We quite agree with the carriers that except for the technical points stated under heading V of our brief there is no doubt that the Commerce Court had jurisdiction to *entertain* petitions by the carriers, but we think counsel for the carriers have overlooked the distinction between jurisdiction to entertain the petitions and jurisdiction to grant the relief prayed for.

It is to be noted that the only case that the carriers cite in support of the final decree of the Com-

merce Court, so far as it enjoins the enforcement by the officers of the Government of the absolute long and short haul clause pending these proceedings, is *Ex Parte Young* (Carriers' Brief, page 112), but in that case the statute was held unconstitutional and threats of its enforcement had been made, two features that entirely distinguish that case from those at bar. We would submit for the reasons stated in our original brief that the carriers' petitions did not show any ground for the granting of the relief given by the Commerce Court, and this is the point we sought to make under heading IV of that brief.

III.

THE FACT THAT THE GRANTING OF THE CARRIERS' APPLICATION IS IN THE NATURE OF AN "ACT OF GRACE" DOES NOT MEAN THAT IT CAN BE PURELY ARBITRARY.

Counsel for the carriers argue that because we cite the case of *Louisville & Nashville* v. *Kentucky*, and the term therein used by this court in describing the action of the Kentucky Commission as being applicable to the cases at bar that we are thereby contending that the carriers are "not in the realm of rights at all." (Carriers' Brief, page 31.) In our original brief, pages 38 to 44, we expressly disclaimed any such position, and of course this court in that case was dealing with the action of a tribunal which was required to make an investigation before exercising its power just as the Interstate Commerce Commission is required to make an investigation. This, as pointed out in our original brief, constitutes a

fundamental and controlling distinction between such cases and the *Yick Wo* case upon which the carriers so firmly rely.

See

Reetz v. *Michigan*, 188 U. S., 509.
People v. *Hasbrouck*, 11 Utah, 291.
Pittsburgh v. *Backus*, 154 U. S., 421.
Lynde v. *Lynde*, 181 U. S., 186.

So far as the carriers rely upon the doctrine of the *Yick Wo* case as showing that there was not due process of law in the action of the Commission because of possible abuse of power on its part and arbitrary discrimination between different carriers applying for relief under Section 4, we contend that the above decision in the *Louisville & Nashville* case is conclusive. We frankly admit that on the other ground of attack by the carriers, to-wit, that there is here an alleged illegal delegation of legislative power, the *Louisville & Nashville* case has no bearing, because the Commission there was a constitutional tribunal; but on the question of arbitrariness or abuse of power we would submit that the discretion vested in a tribunal created by a state constitution must when challenged under the provisions of the federal constitution be tested in the same manner as would the discretion exercised by an administrative officer under a state law or a municipal ordinance. As was recently stated by Judge Alfred P. Thom in his paper read before the Bar Association of Virginia on the long and short haul clause, the decisions of this court "uniformly hold that a State cannot violate the 14th Amendment to the Federal

Constitution by its own constitution any more than it can by its statutes or by any other agency of the State." Citing *Railroad Company* v. *McClure*, 10 Wall., 511, 515; *Gunn* v. *Barry*, 15 Wall., 610, 623, *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S., 650, 672; *Tier* v. *McGehee*, 148 U. S., 137, 140.

The question of due process under the Federal Constitution was raised in the *Louisville & Nashville* case and decided contrary to the contention of the carriers, and the opinion of Judge SHIRAS termed the action of the Kentucky Commission "an act of grace." This we would submit is a complete answer to the carriers' contention here that we, by using the same term, "act of grace," necessarily admit that the action of the Commission could be purely arbitrary, a conclusion which we at all times have emphatically disclaimed.

The carriers attempt to distinguish the *Louisville & Nashville* case by stating that the Railroad Company, "being organized under the laws of Kentucky, was amenable to its constitution, there being no contract right involved." (Page 36.) Counsel have perhaps overlooked the fact mentioned in the paper of Judge THOM that the Railroad Company "had been chartered and had been constructed long before the constitution of the State of Kentucky, then being considered, was adopted."

So that the rights which they had already acquired were entitled to protection under the Federal Constitution against any encroachment by the newly adopted constitution of Kentucky.

IV.

THE CARRIERS WHILE CONTENDING THAT THE COMMISSION ERRED IN REQUIRING THEM TO SHOW THE REASONABLENESS OF ALL RATES TO INTERMEDIATE POINTS IN THESE PROCEEDINGS FOR RELIEF UNDER SECTION 4, TAKE WHAT WE WOULD SUBMIT IS THE INCONSISTENT POSITION THAT THE COMMISSION COULD NOT GRANT RELIEF WITHOUT PASSING UPON THE REASONABLENESS OF SUCH RATES.

Counsel for the carriers say that the Commission imposed upon them a condition "practically impossible for them to meet of establishing the reasonableness of all rates to intermediate points" (Brief, p. 21), and they point out that in the amended fourth section as approved in the Senate there was an express provision requiring the Commission in passing on applications under Section 4 to find that the rates "for the shorter distance involved in the application are just and reasonable rates," but that this provision was stricken out, counsel say, "so we must conclude that it was not intended that on such applications it would be necessary to show that the rates for the shorter distance were just and reasonable." (Page 72.) They specifically state that the above action of the Commission in requiring them to establish the reasonableness of the rates was error (Brief, p. 74), and they allude to the large number (over five thousand) of applications filed with the Commission upon which we had commented. (Brief, p. 76.) Nevertheless, counsel seem to criticize the Commission for passing on these applications *with-*

out determining the reasonableness of the rates involved. (Carriers' brief, pp. 96 to 98.) One of the express grounds on which they attack these orders is that they "dispose of pending complaints for the establishment of just and reasonable rates at various intermediate points *without* finding the rates complained of to be unreasonable or prescribing in lieu of them rates found to be reasonable." (Brief, page 96.) As a matter of fact, both of these orders expressly reserve the right of the Commission to pass upon the reasonableness of any rates involved at a subsequent time, so that it is difficult to see how it can be said that these orders "dispose of these complaints."

Surely, if it is impossible for the carriers, as they allege, because of the multiplicity of rates involved in the few applications here under consideration, to establish the reasonableness of such rates, much more must it be impossible for the Commission in passing on the five thousand applications pending before it to investigate and pass upon the reasonableness of each one of the numberless rates there involved. It should be noted that counsel for the carriers do not speak one word in defense of the opinion of the Commerce Court in so far as it laid down the rule that the Commission in passing upon applications under Section 4 must fix the reasonable rate for the shorter haul, and neither do they make any comment upon our argument in our original brief that such action on the part of the Commission would be wholly unauthorized.

V.

THE INTERPRETATION PLACED BY COUNSEL FOR THE CARRIERS UPON THE EXPRESS LANGUAGE OF THE FOURTH SECTION REQUIRING THE COMMISSION TO PRESCRIBE FROM TIME TO TIME THE EXTENT TO WHICH RELIEF MAY BE GRANTED TO THE CARRIERS CANNOT BE SUSTAINED.

In concluding our original brief we pointed out that on many questions of law and of fact in these cases we agreed with the carriers and that the principal difference between us, aside from the question of the constitutionality of Section 4, was as to the meaning to be given these words in the proviso. The only suggestion made by the carriers before the Commerce Court, so far as we are aware, was that these words should be held to refer exclusively to extent of *territory*. In their brief here they make the additional suggestion that the word "extent" may refer to the "character or kind or traffic"—that is, that the Commission may authorize the carriers to violate the absolute prohibition of the long and short haul clause as to certain special articles, giving them special commodity rates; or, again, that a violation of the absolute prohibition of the long and short haul clause might be permitted as to freight traffic but denied as to passenger traffic. We would submit that all of these three suggestions are equally untenable. (Carriers' Brief, p. 87.) Attention should be called to the fact that while the carriers quote at great length (Carriers' Brief, pp. 58-72) from the debates in Congress they do not quote a

single word showing that Congress had in mind extent of *territory, character or kind of traffic.*

Under the original fourth section it had been held by this court that the carriers could of their own motion and as of right disregard the absolute prohibition of the long and short haul clause and to any extent, provided the circumstances and conditions were substantially dissimilar at the more distant point. Even upon complaint filed against specific rates, all that the Commission could do under Section 4 was to determine whether or not there were dissimilar circumstances. This all resulted from the presence in the first part of the section of the words which were stricken out by the amendment for the very purpose, as appears by the debates in Congress, of vesting in the Commission and not in the carriers the right to determine the question as to whether the conditions were or were not dissimilar and of measuring the extent of such dissimilarity and the force of such competition at the more distant point, and fixing the *extent* to which relief should be granted to the carriers in order to meet the dissimilarity in conditions existing in the particular case under consideration. If the interpretation contended for by the carriers is adopted, the only change accomplished in the act by striking out these words is to place the right of initiative with the Commission and to shift the burden of proof of dissimilar conditions to the carriers. Such an interpretation, as we pointed out in our original brief, would render this section entirely ineffectual for correcting the evil against which it was aimed.

It is to be noted that counsel for the carriers agreed with the statement in our original brief that the Commission could not, in passing upon an application under Section 4, fix an absolute minimum rate. (Carriers' Brief, pp. 88 and 90.) If this is so, there is no manner open to the Commission for measuring the extent of the relief except by the fixing of a relationship between the rates to the intermediate points and the terminal points. The carriers in their brief have nowhere intimated that such action by the Commission fixes a minimum rate or that these orders in any way attempt to initiate rates, the power to do which is—as they themselves contend—still vested in the carriers. (Carriers' Brief, p. 110.)

The carriers state at pp. 90 and 91 of their brief:

> "If, after granting such application for dispensation from the rigid rule of the clause, it should be afterwards found and determined that the right was merely exercised so as to violate some other section of the act, such violation could be readily corrected by a proper order. Thus if the evidence should warrant and the Commission should find that a lower rate fixed by the carrier to the more distant point, *even after the granting of its application*, is not made as a competitive matter, but merely as a matter of undue or unwarranted favoritism, the Commission might condemn the adjustment and enter an appropriate order requiring the carrier to remove or correct any undue discrimination and cease from a violation of any of the other sections as the case might warrant."

This is exactly the position stated by us in our original brief, but we do not see that it in any way tends to deny the power of the Commission to fix a

relationship of rates and to establish percentages, as was done by these orders. The carriers apparently do not agree with the Commerce Court in criticising these percentages merely because they were not based on any absolute rates; and it is apparent that as a practical matter, the result of the interpretation which the carriers seek to place upon the words of the proviso concerning the fixing of the extent of the relief would be to ignore such words altogether.

We are entirely at a loss to know what form of order the Commerce Court would have had the Commission enter, but apparently the carriers would have had it merely enter an order granting or denying the applications, without any limitations or conditions whatever.

VI.

THESE ORDERS ARE NOT ATTACKED BY THE CARRIERS ON THE GROUND THAT THEY DIVIDE THE COUNTRY INTO ZONES.

As appears by the affidavit of E. P. Ripley (Rec., 883, p. 282), the Commission in these orders used "as a basis for its zone lines the territorial boundary lines established by the trans-continental carriers and employed by them for many years past in making rates to Pacific Coast terminal points to meet water competition." Nowhere in the brief filed by the carriers are the zones as such attacked.

VII.

THIS RECORD DOES NOT DISCLOSE ANY FACTS UPON WHICH A CLAIM OF CONFISCATION CAN BE BASED.

In the Illinois Central case, 215 U. S., 452, Mr. Chief Justice White said at page 470:

> "Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Telegraph Cable Company* v. *Adams,* 155 U. S., 688, 698. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised."

We would ask under which of these three head-

ings these orders of the Commission fall. It is admitted that the orders are regular as a matter of procedure and form, and therefore do not come within class (b); we have shown, as we think, that, not being arbitrary and no improper considerations having been in view by the Commission, they do not fall within class (c). It would therefore seem that in order to be successful, the carriers must make out a case under class (a), and while they do not so expressly state, it would seem that the real essence of their argument is that these orders are confiscatory. Counsel for the carriers say:

> "The Commission in substance declares: It is unnecessary to inquire whether the carrier is receiving a rate that is just and reasonable; it is unnecessary to determine whether the terminal rate is such as will permit the carrier to meet the competition; all that is required is to fix a certain relation between the intermediate rate and the terminal rate and leave the carrier to adjust its rates in accordance with this relation, *although it may have either to elevate the terminal rates so high as to lose the traffic, or else, lower the intermediate rates to a point where it is not receiving a reasonable compensation.*" (Carriers' Brief, p. 98.) (The italics are ours.)

We would submit that this statement, which really embodies the whole force of the carriers' argument, contains two assumptions which are not supported by the findings of the Commission. First, as to the terminal rates,—it is alleged in the carriers' petition that the rates to the terminal points are and at all times have been more than the cost of service and, further, that the all-rail rates are higher than the water rates "because of the more expeditious

and satisfactory service afforded and the absence of marine insurance and of the water transportation risk." (Carriers' Brief, page 24.) No claim of confiscation can be predicated upon the mere statement that by reason of these orders the carriers might be required to elevate the terminal rates so high as to lose some of their traffic. By their own admission the carriers have themselves added something to the cost of water transportation in fixing their rates, and we would submit that it is for the Commission and not for the carriers to determine the amount of the excess in value of rail over water services. All the facts were before the Commission and were taken into consideration by it and it is fair to assume, in view of the presumption that must prevail in favor of the Commission's findings and orders, that the Commission found that the carriers would not lose any of their traffic to the coast terminals by reason of obeying these orders. It is fair to assume that the Commission differed from the carriers in measuring the difference in value of the all-rail and water services.

As to the intermediate rates, there is no proof or even authoritative statement before this court as to which of the two alleged alternatives the carriers will adopt in obeying these orders of the Commission, and therefore no claim of confiscation can be predicated upon the *possibility* that they may at some future time lower their rates to the intermediate points, rates which are shown by this record to be far in excess of the rates to the more distant points—and, as above stated, even these latter rates are admitted by the carriers to produce more than

the cost of service. In this connection we would call attention to an idea expressed in different places in this brief of the carriers that the mere desire of the manufacturers in the intermediate territory to compete at Pacific coast points with manufacturers on the Atlantic seaboard, and the mere desire of carriers originating in Chicago to transport such traffic to the Pacific coast terminals, were sufficient reasons justifying the establishment of blanket rates from all of eastern defined territory as far west as Denver to the Pacific coast terminals. The Commission refused to recognize such desire as a sufficient reason for maintaining these blanket rates (Carriers' Brief, page 21), and we would submit that the carriers by establishing such rates, instead of giving to the different localities the natural advantages to which their respective locations entitle them, have, in fact, deprived these different localities of these very advantages.

The carriers in their brief allude to the opinion of Commissioner Prouty as being the "*unanimous*" opinion of the Commission. That of Commissioner Lane was equally the unanimous opinion of the Commission and, as pointed out in our original brief, the findings of the Commission as expressed by Commissioner Lane were clearly in conflict with the findings of fact made by the Commerce Court in its opinion and with the allegations of fact made by the carriers in their petitions and here sought to be maintained. It is true that Commissioner Prouty did say that the coast rates were "controlled" by water competition, but even so, this is by no means the same as holding that these rates were less than

reasonable or that the specific rates now in force were definitely determined by such water competition, or that, if they were increased at all, the carriers would lose traffic. Besides we would submit that the legality of the Commission's order is not to be tested solely by the coast to coast rates. It must be borne in mind that the carriers in their applications asked for permission to continue in force existing rates from Chicago and St. Paul and other intermediate points as well as from New York. As pointed out in our original brief Commissioner Lane emphatically declares that water competition does *not* control the rates from Chicago and St. Paul to the Pacific coast and that market competition is a mere euphemism for railway policy, and that Commissioner Prouty in his opinion expressly condemned the system of making rates that would justify a higher rate to Spokane than to Seattle, the longer haul including the expensive carriage over the Cascade Mountains. The only way in which water competition can be said to directly affect rates from intermediate points to the Pacific coast is on the theory that traffic originating at such points might be taken to New York and then by water to the Pacific coast. In that event the rates from the intermediate points should exceed the New York-Pacific coast rates by the amount of the cost of the haul to the Atlantic Seaboard. This method of making rates has never been in force by the carriers who have granted to Chicago the same rates to the Pacific coast terminals as to New York. The carriers in their brief say that this was "*necessarily*" done. (Carriers' Brief, page 19.) We would re-

spectfully submit that the opinions of Commissioners Lane and Prouty show that such was not the fact and that these rates were established merely as a matter of railroad policy and a desire of the carriers to secure traffic, which policy and desire were properly not regarded by the Commission as sufficient reason for allowing a departure from the express prohibition established by Congress against charging a higher rate for the shorter haul. A good illustration of the present rates is found in the first paragraph of Commissioner Lane's opinion of June 6, 1910 (19 I. C. C., 238), where he says:

> "For carrying a carload of first class traffic containing twenty thousand pounds from Omaha to Reno the Union Pacific-Southern Pacific line charges $858. If a like carload is carried 154 miles further, to Sacramento, the charge is but $600. The first class rate to the more distant point, Sacramento, is $3 per hundred pounds, and to the nearer point, Reno, $4.29 per hundred pounds. *If a like carload of freight originates at Denver,* 500 *miles west of Omaha, the same rates to Reno and Sacramento apply; and if the freight originates at Boston,* 1,700 *miles east of Omaha, the rates are the same.*"

Is it to be wondered at that the Commission, in the exercise of discretion vested in it—to be used for the well being of the different communities served by the carriers, as well as of the carriers themselves—failed to find that such rates as these constituted special cases, which under the authority vested in the Commission by Congress, should entitle them to special relief from the general condemnation expressed by Congress for the system of rate making favoring the longer haul.

We would respectfully submit that the Commission in entering these orders was acting within its powers and was only carrying out the purpose of Congress as expressed in the Interstate Commerce law.

Respectfully submitted,

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~~Nos. 480, 513, 481 and 514.~~

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

UNITED STATES OF AMERICA

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND SIXTEEN OTHER RAILROAD COMPANIES.

UNITED STATES OF AMERICA

vs.

UNION PACIFIC RAILROAD COMPANY AND TEN OTHER RAILROAD COMPANIES.

INTERMOUNTAIN RATE CASES.

Appeals from the Commerce Court.

REPLY BRIEF ON BEHALF OF THE CHICAGO ASSOCIATION OF COMMERCE FILED ON THE REARGUMENT.

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MAY IT PLEASE THE COURT:

At the time of the previous argument of this case several briefs had been filed on behalf of the carriers which we had not had an opportunity to examine, and to which we, therefore, had made no reply. Our previous reply brief was devoted en-

tirely to replying to the first brief filed on behalf of the Union Pacific Railroad Company and certain other carriers, and it contained no reference to the supplemental brief filed on behalf of the same carriers or to the brief filed on behalf of the Denver & Rio Grande. Since the date of the argument a third brief has been filed on behalf of the Union Pacific, and it is to these additional briefs that we now desire to make a reply.

I.

THE THIRD BRIEF ON BEHALF OF THE UNION PACIFIC IS WHOLLY INCONSISTENT WITH THE EARLIER CONTENTION THAT THE AMENDED FOURTH SECTION IS UNCONSTITUTIONAL.

In this new argument it is insisted that the Commission in acting under the proviso of Section 4 must give effect to all kinds of competition including water competition and market or railroad competition. Counsel supports this contention by pointing out that the last clause of what has been termed the second proviso expressly refers to water competition, and he, therefore, finds as a matter of construction that the 4th Section, as amended, still requires the Commission in passing upon applications by the carriers to take into consideration the very matters which it is admitted did, prior to the amendment, excuse the carriers from complying with the terms of the section. In speaking of the amendment, counsel at page 30 of his brief, says:

"We may well conclude, then, that if the leg-

> islative body intended to withdraw from the ken of the Commission any character of competition which had theretofore been regarded as sufficient to warrant the lesser rate at the more distant point, if it intended to take away the influence of any competition to give such warrant, it would have done so by affirmative words and not have left the matter to conjecture inference or construction."

We would submit, that if as a matter of construction it can be held that the Commission is still bound to consider water and other competition, the argument heretofore made by the carriers to the effect that the amended section is unconstitutional because the Commission does not now have to take these matters into consideration must of necessity fail. This court will, in accordance with well recognized principles, construe the statute in such manner as to render it constitutional if the language of the amended section justifies such construction. It is to be noted that in this additional argument just filed not a single word is said concerning the alleged unconstitutionality of the section although that was the principal basis of the bills filed in the Commerce Court attacking the orders of the Commission.

II.

THE CLAUSE AUTHORIZING THE COMMISSION TO PRESCRIBE THE "EXTENT" OF THE RELIEF TO BE GRANTED HAS NOW BEEN GIVEN A THIRD AND DIFFERENT CONSTRUCTION BY COUNSEL. THIS LIKE THE TWO PREVIOUS CONSTRUCTIONS BY COUNSEL ARE, WE WOULD SUBMIT, AT VARIANCE WITH THE PLAIN MEANING OF THE LANGUAGE OF THE PROVISO.

Counsel in his original brief contended that these words meant extent of *territory* or possibly kind of *traffic*. In the supplemental brief filed in Washington just before the prior argument it was suggested that this clause had a totally different meaning, and that the Commission could fix the minimum rate to be charged by the carrier for the longer haul, a contention which was not countenanced in the original brief filed by the same carriers two days previous, nor in the arguments made by their counsel before the Commerce Court. The new brief contains another and totally different suggestion, that is to say, that the Commission must, in the first instance, in passing upon an application of a carrier either deny or grant the same without limitations, but that if the same is granted and the permission given is abused by the carrier, the Commission at some subsequent date may limit the extent of the relief granted. If, as this last brief seems to admit, there is authority in the Commission to limit the extent of the relief granted at some subsequent date, why, we would ask, does not the same line of reasoning lead to the conclusion that

there is authority in the Commission to limit the relief granted at the time that the application of the carrier is first passed upon? By this admission counsel practically concedes, as we think, the force of the position taken in our original brief. As a practical question it is clear that the entire matter should be passed upon at one time. Why should the carrier be first given permission by the Commission to depart from the Section without limitation and then at some subsequent time, and after rates have been readjusted be ordered to again change and readjust its rates in accordance with the new order of the Commission.

It is to be noted that a large portion of this last brief is devoted to quotations from the opinions of Commissioners Lane and Prouty which show that those commissioners took into consideration different forms of competition in passing upon the applications of the carriers, and the principal criticism made of the action of the Commission would seem to be that having found such competition to exist they did not, as a necessary result of such finding, grant *unconditional and absolute* relief to the carriers from the prohibition of the 4th Section.

In the later pages of this latest brief we find, however, that counsel contends that:

> "If taking advantage of the order (that is the order granting the application of the carriers) the carrier should inaugurate a rate unduly discriminatory *because less than necessary to meet the competition* on complaint the rate could be corrected, or even without complaint on the Commission's own initiative it could be suspended, investigated and corrected."

And counsel bases this power upon the "extent" clause of the 4th Section which he has just quoted on the previous page. He therefore finds, as we do, in this clause that the Commission has authority to determine whether the carrier has in fact fixed terminal rates that are "less than necessary to meet the competition" and to correct such rates, if initiated by the carrier; the only controversy between him and us being as to the *time* when such corrections should be made. This, we would submit, is a very material change on the part of the carriers from their earlier contentions, and is in reality an admission that the view advanced in our original brief is the proper construction of the act.

We would submit that a reading of the section itself is all that is necessary to show the fallacy of each of the three constructions sought to be placed by the carriers in their several different briefs upon this clause of the statute. In the first place it is to be noted that the prohibition of the Section is against the charging of "any greater compensation for a shorter than for a longer distance over the same line," and that under the proviso carriers "may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such designated common carriers may be relieved from the operation of this Section." To our mind it is perfectly plain as a matter of construction that the "*extent*" refers to the *extent* to which the charge for the longer distance may be

less than that for the shorter distance, and that this extent should, in the first instance, be determined at the time that the permission is granted to the carrier to depart from the absolute prohibition of the Section.

Counsel says in his latest brief that the Commission's orders are invalid because as he now contends these orders practically fix rates, and that inasmuch as the Commission had no power whatever to initiate rates at the time when the proviso was first incorporated in the Section it cannot, he contends, be now held to include such a power. It is, we think, a sufficient answer to point out that these orders here involved do not in any sense initiate or fix rates. This was fully recognized by counsel for the carriers in the arguments in the Commerce Court. As was stated by Mr. Donnelly in the argument in that court:

> "*Not a single rate is suggested.* The carriers are to-day at liberty, so far as the orders of the Commission go, to make any rates they see fit to make from any point in that zone to any other point. The only prohibition is that those rates shall not exceed what the rates are to the terminals. The alterative is presented to the carriers of raising their rates to the Pacific Coast."

And again Mr. Donnelly said:

> "The second thing is that under the order *no rates are prescribed. What rates shall actually be prescribed are left to the discretion of the carrier*, so far as the order is concerned. They may adjust the situation and comply with the order by raising their terminal rates or lowering their intermediate rates."

Indeed, one of the principal reasons the Commerce Court gave for setting aside the orders of the Commission was that those orders prescribed percentages, *irrespective of absolute rates*, and did *not* fix any rates to the intermediate points.

III.

IT WAS CONGRESS—AND NOT THE COMMISSION—THAT CREATED A RELATIONSHIP IN THE RATES TO THE MORE DISTANT AND NEARER POINTS.

Counsel for the carriers contends that the "ineradicable vice" in these orders is that a relationship is thereby created between the rates to the nearer and to the more distant points. (Supplemental Brief on behalf of the Union Pacific, page 9.) We would submit that it was Congress and not the Commission which ordained that there should be such a relationship. It is clear that Congress in enacting the 4th Section in its original form intended to lay down a general rule prohibiting a greater charge for the shorter haul and contemplated that the Commission would be called upon to pass upon the application of carriers for leave to depart from the long and short haul rule, and for this reason inserted the proviso. We are informed by the opinion of the Commission in the *Clyde Steamship Case*, 5 I. C. C. Rep., 390, that the proviso was incorporated in the 4th Section before the words which have now been omitted were incorporated therein. Congress by inserting these words defeated what was its evident purpose, as these words en-

titled the carriers, *as a matter of law*, to ignore the Section whenever the circumstances were dissimilar and, therefore, excused them from the necessity of applying to the Commission at all. (Behlmer and other cases.)

Under the construction placed upon the original 4th Section by this court no relationship of rates was created between the long and short haul points on the same line, provided the circumstances were dissimilar, but when Congress came to deal with this situation again it purposely omitted the very words upon which the previous decisions of this court had been based so that in its present amended form the 4th Section clearly creates such a relationship in all cases and forbids the charging of a higher rate to the nearer point unless the commission shall in a particular case grant permission so to do. Congress, therefore, by the amendment at once strengthened the absolute prohibition of the Section and revived the proviso which had become a "nullity," as Commissioner Prouty states.

IV.

WE WOULD SUBMIT THAT IT IS NOT TRUE AS URGED BY COUNSEL FOR THE DENVER & RIO GRANDE THAT THE COMMISSION IGNORED MARKET OR RAILROAD COMPETITION IN DENYING THE APPLICATIONS OF THE CARRIERS AS APPLIED TO POINTS IN ZONE ONE.

In the brief filed on behalf of the Denver & Rio Grande it is contended that, at least as to zone one, the orders of the Commission must be held invalid,

because "grounded upon a deliberate disregard of competitive conditions which the carriers are entitled under the law to have considered in the determination of their applications." (Br., pp. 50.) It is claimed at page 65 that although the Commission recognized by its reports the existence of market competition affecting rates from points in zone one to the Pacific terminals it did not give such competition the force to which it was entitled, or, in fact, any force whatever, because the Commission denied the applications of the carriers for leave to make higher rates to the intermediate points. We would submit that this is not a legitimate conclusion. It may well be that the Commission did give weight to the competition which was said to exist at the terminal points and may still have decided that any concession in the way of rates that such competition might seem to justify was more than off-set by the additional cost of service in hauling the traffic to the more distant points. To take the concrete example discussed at length by Commissioner Prouty in his opinion—that of rates between St. Paul, Spokane and Seattle. The mere fact that the Commission by its order declined to permit the charging of more for the haul from St. Paul to Spokane than for the haul from St. Paul to Seattle does not mean that it ignored special competitive conditions affecting the St. Paul-Seattle rate. Indeed, the order by impliedly recognizing the propriety of charging as high a rate to Spokane as to Seattle shows that the Commission must have considered that there were special competitive conditions at Seattle for otherwise they could not possibly have permitted

the carriers to charge as much for the haul to Spokane, which was 400 miles shorter and did not involve the crossing of the Cascade Mountains,—facts upon which Commissioner Prouty makes special comment.

V.

COUNSEL FOR THE DENVER AND RIO GRANDE SO LIMIT THE POWER VESTED IN THE COMMISSION AS TO DEPRIVE IT OF ALL DISCRETION IN ITS EXERCISE.

The greater part of the brief filed on behalf of the Denver & Rio Grande Railroad Company is devoted to a discussion of the constitutional question involved. It is contended by counsel that we were wrong in the position we assumed in our original brief as to the breadth of discretion that was vested in the Commission under the proviso of the 4th Section. Counsel go so far, as it seems to us, as to deprive the Commission of all discretion whatsoever. At pages 15 and 16 of the last mentioned brief it is contended that in order to sustain the constitutionality of the act it must be found that the act indicates the conditions upon which the Commission *must grant* relief as well as those under which it *must refuse* it "*so that when the Commission in the exercise of its power to determine the ultimate facts finds that any given conditions exist a duty upon its part will arise to grant or refuse relief.*"

As pointed out in our original brief (page 106) Judge Cooley and Judge Knapp in writing early decision of the Commission declared that a wide "dis-

cretion'' was vested in the Commission under the proviso of Section 4. Counsel in their brief also use the word ''discretion'' but say that it must be a controlled discretion and urge that it is not enough that such discretion should be controlled by the general constitutional limitations, or, indeed, by the general purposes of the act, but that it must be ''controlled'' in the strictest sense as above indicated so that with certain given facts the Commission *must* either *grant* or *refuse* relief. To this view we cannot assent. It needs no argument or citation of authorities to show that a legal ''discretion'' can constitutionally be vested by Congress in an administrative officer. The very fact that the word discretion is used in this connection negatives, as we think, the view urged by counsel:

> ''The term 'discretion' implies the absence of a hard-and-fast rule. *The establishment of a clearly defined rule of action would be the end of discretion,* and yet discretion should not be a word for arbitrary will or inconsiderate action. 'Discretion means the equitable decision of what is just and proper under the circumstances.' Bouvier, Law Dic. 'Discretion means the liberty of power of acting without other control than one's own judgment.' Webster, Dict.''

These definitions were given by Mr. Justice Shiras in the case of *Steamship Styria* v. *Morgan*, 186 U. S., pp. 1, 46 Lawyers ed. pp. 1027, and similar language is found in many other cases.

We freely admit, as was said in our original brief, that the action of the Commission cannot be arbitrary in such a sense as would violate the constitutional provisions requiring due process of law, but

counsel insists that such a limitation upon the discretion vested in the Commission would not render the grant of power constitutional. They rely, however, in their argument upon the *Yick Wo* case which dwelt exclusively with constitutional limitations against arbitrary power, and while holding that the attempted delegation of power therein involved was invalid because of its failure to observe these constitutional limitations clearly intimated that if these limitations had been observed the delegation of power would have been valid. We, therefore, contend, as we did in our earlier brief, that while the Commission must act in a reasonable and not an arbitrary manner, and must have in view the general purposes of the act, including the definite prohibition against charging more for the shorter haul, it is not necessary to hold, in order to sustain the constitutionality of the section, that if certain facts are found by the Commission they *must* grant or *must* refuse. We think that the authorities cited in our original brief amply sustain our contention in favor of a more liberal construction and in favor of a wider discretion in the Commission.

VI.

THE TESTS LAID DOWN BY COUNSEL FOR THE DENVER AND RIO GRANDE FOR DETERMINING WHETHER THE AMENDED FOURTH SECTION CONTAINS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER ARE NOT THE CORRECT ONES.

It is contended in the brief last mentioned that the grant of power here made to the Commission is con-

spicuously a grant of legislative power, and in this connection counsel state (p. 10):

> "The Commission must determine for itself the rules that shall govern its action, and the result that the carrier is subjected to the prohibition of the section and the result that it remains exempt therefrom alike represent the intent and will of the Commission; and upon that hypothesis there is no means of determining whether in a specific instance the rule of conduct that is imposed upon the carrier is the rule that Congress wished or would wish applied. Yet, the rule so imposed determines the legality of the carrier's future course of action and *makes it lawful for it to do or not to do given things, attaches or remits heavy penalties and gives rise to civil rights and obligations. Surely the imposition of a rule entailing such results is legislation and if the rule proceeds from the unguided will of the Commission must be founded upon delegation of legislative power.*"

In this connection we would call counsel's attention to the case of *United States* v. *Grimaud*, 220 U. S., 506. The very features upon which counsel here comments as indicating a delegation of legislative power were, we would submit, present in that case and still the delegation of power was sustained. There the Secretary of Agriculture was authorized to prescribe for himself rules that should govern the occupation of the public domain, and the rules so imposed "determined the legality of the defendants' line of action," and "made it lawful for the defendant to do or not to do given things," and "heavy penalties" were attached to their violation. In that case the defendant was indicted for violating regulations promulgated by the Secretary, and this indictment was sustained.

Again counsel states at the bottom of page 11 that a lawful delegation "never is and never can be so broad as to confer the function of protecting the whole public interest in a given subject as the judgment of the officer or administrative body may deem wisest; for the discharge of that function is the very essence of legislative power and discretion." In this connection we would again call attention to the case of *Field* v. *Clark*, and to the many acts of Congress reviewed by Mr. Justice Harlan in that decision. Among such other acts were the following:

> "The authority given to the President by the Act of June 4th, 1794, to lay an embargo on all ships and vessels in the ports of the United States, 'Whenever, in his opinion, *the public safety shall so require*,' and under regulations, to be continued or revoked '*whenever he shall think proper;*' by the Act of February 9th, 1799, to remit and discontinue, for the time being, the restraints and prohibitions which Congress had prescribed with respect to commercial intercourse with the French Republic, 'If he shall deem it expedient and *consistent with the interest of the United States*,' and to 'revoke such order, whenever, in his opinion, *the interest of the United States* shall require;' by the Act of December 19th, 1806, to suspend, for a named time, the operation of the Non-importation Act of the same year, 'if in his judgment *the public interest* should require it;' by the Act of May 1st, 1810, to revive a former Act as to Great Britain or France, if either country had not, by a named day so revoked or modified its edicts as not 'to violate the neutral commerce of the United States;' by the acts of March 3d, 1815, and May 31st, 1830, to declare the repeal as to any foreign nation, of the several acts imposing duties on the tonnage of

> ships and vessels, and on goods, wares, and merchandise imported into the United States, when he should be 'satisfied' that the discriminating duties of such foreign nations, '*so far as they operate to the disadvantage of the United States,*' had been abolished; by the Act of March 6th, 1866, to declare the provisions of the Act forbidding the importation into this country of neat cattle and hides of neat cattle, to be inoperative, '*whenever in his judgment*' their importation 'may be made *without danger of the introduction of spread of contagious or infectious disease among the cattle of the United States,*'—must be regarded as unwarranted by the Constitution, *if* the contention of the appellants, in respect to the third section of the Act of October 1st, 1890, be sustained."

We are not aware that these particular acts were ever passed upon by the courts except as this decision approved them but similar statutes have been the subject of adjudication as appears by the citations in our original brief. We would therefore submit on the strength of those citations that the tests laid down by counsel for the determination of the question as to what power can be lawfully delegated to an administrative body are not the true ones.

VII.

THE COMMERCE COURT HAD NO JURISDICTION TO ENTERTAIN THE PETITION BECAUSE THE ORDER OF THE INTERSTATE COMMERCE COMMISSION IN THE FOURTH SECTION CASE WAS NEGATIVE IN CHARACTER.

In the case of *Procter & Gamble Co.* v. *U. S., et al.*, 225 U. S., 282, this court stated the question presented thus:

> "Is the authority of the Commerce Court confined to enforcing or restraining, as the case may require, affirmative orders of the Commission, or has it power to exert its own judgment by originally interpreting the administrative features of the Act to Regulate Commerce and upon that assumption treat a refusal of the Commission to grant relief as an affirmative order and accordingly pass on its correctness."

The court then decides that the second clause in the section of the Act in relation to the Commerce Court granting to that court jurisdiction to enjoin in whole or in part any order of the Commission must be interpreted as follows:

> * * * "They confer jurisdiction only to entertain complaints as to affirmative orders of the Commission; that is, they give the court the right to take cognizance when properly made of complaints concerning the legality of orders rendered by the Commission and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal."

The order of the Commission reviewed by the Commerce Court in this case was entered upon a petition filed by the carriers for leave to violate the

strict long and short haul rule as set forth in the amended Fourth Section of the Act. At the outset it should be noted that as to rates from all territory in Zone 1 to the coast points and to intermediate points the petition was denied. The order reviewed, therefore, as to all this territory was a negative order within the rule of the *Procter & Gamble* case beyond any question of doubt.

As to the balance of the rates presented by the petition of the carriers the Commission gave the carriers a limited right to violate the long and short haul rule. The carriers here attack the order because—they insist—they are compelled to do one of two things; either to reduce the present intermediate rates, or to raise the coast rates. But it must be apparent from an inspection of the order of the Commission that there is nothing in the order which compels either action by the carriers. Under Section Four the duty of the carriers is plain, either obtain the permission of the Commission or obey the hard and fast rule of the statute. The compelling power which forces upon them the two alternatives complained of is not therefore the order of the Commission, but is the rule, laid down by Congress in the section. The order is permissive only. It does not require anything; not even the adoption of either alternative. We respectfully submit that this order is negative in substance as well as form and comes within the principle of the Procter & Gamble decision.

It is to be noted that in our original brief in this case we urged that the Commerce Court was without jurisdiction and the *Procter & Gamble* decision has confirmed the views therein set forth.

The other matters set forth in the new briefs filed by the carriers have, we think, been sufficiently answered by our original and reply briefs already on file.

Respectfully submitted,

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1892.

UNITED STATES OF AMERICA

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

UNITED STATES OF AMERICA

v.

UNION PACIFIC RAILWAY COMPANY ET AL.

APPEALS FROM THE CIRCUIT COURT.

ARGUMENT OF J. C. DELLAND IN REPLY TO THE SECOND BRIEF OF THE GOVERNMENT FILED AT THE OCTOBER TERM, 1892.

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IN THE

Supreme Court of the United States.

Nos. 480, 513, 481 AND 514.

UNITED STATES OF AMERICA

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

UNITED STATES OF AMERICA

v.

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APPEALS FROM THE COMMERCE COURT.

ARGUMENT OF F. C. DILLARD IN REPLY TO THE SECOND BRIEF OF THE GOVERNMENT FILED AT THE OCTOBER TERM, 1912.

MAY IT PLEASE THE COURT:

The briefs and supplemental brief of appellees state with some degree of fullness, and, it is hoped, with a requisite degree of clearness, the positions on which they rely for an affirmance of the judgment of the Commerce Court. It is not my purpose to wearyingly travel over ground which has been gone over in those briefs, but there are some things contained in the new brief of the Government to which I wish to reply some-

what more specifically than, of necessity, a reply appears in briefs and arguments filed prior to the time the Government's new brief was prepared. As far as practicable, I shall avoid repetition of what has already been said, but, in order that this argument may not have unseemly breaks, some repetition will be found necessary.

The Government is not altogether happy in its designation of cases 883 and 928, the *United States* v. *Atchison, Topeka & Santa Fe Railway Company et al.*, as the Reno-Phoenix case. More accurate is the designation, Fourth Section case, given them by appellees. The Reno case (that is, the case of the Commission of Nevada against the carriers) and the Phoenix case (that is, the case of the Maricopa County Commercial Club against the carriers) were pending, as to commodity rates, at the same time that the application of the carriers for relief from the rigid rule of the Fourth Section was passed upon by the Commission in its Order 124. The complaints in those cases were similar to the complaint in the Spokane case. In the Reno case, rates from the east to Nevada points were complained of as unreasonable in themselves and as discriminatory in that they were in excess of the coast rates. In the Phoenix case, rates from eastern territories to Phoenix were complained of for the same reason. June 7, 1910, the Commission disposed of the class rates involved in these complaints, but left the commodity rates for further consideration. (*R. R. Com. of Nevada* v. *S. P. Co. et al.*, 19 I. C. C. 238.) The quotations contained in the new brief at page 8 are from this report disposing of the class rates. When the Commission entered its order in the Fourth Section case the commodity rates embraced in the Reno

and Phoenix cases were discussed at length by Commissioner Lane, but they were not in terms embraced in the order, but were left to be adjusted in accordance with its provisions, without a finding of unreasonableness as to specific rates complained of and without the substitution of any new rates in their stead as rates reasonable in themselves.

I.

The first general proposition of the Government in its new brief is this:

> "THE ORDER MADE BY THE COMMISSION WAS JUSTIFIED BY THE FACTS FOUND BY THEM; AND THEY GAVE FULL CONSIDERATION AND WEIGHT TO EVERY CHARACTER OF COMPETITION RELIED UPON BY THE CARRIERS."

Under this proposition are several subsidiary propositions, and these I now desire to notice:

The first subsidiary proposition is:

> *"The Commission did not find, in either the Reno-Phoenix or the Spokane case, that the rates from the eastern territory to the Pacific terminals are forced by ocean competition."*

The second is:

> *"The Commission did not find that the rates from interior points to the Pacific terminals are not influenced by water competition, but found that they are not compelled by such competition, and are the result of the volition of the carriers."*

Neither of these propositions is sustained by the findings of the Commission, but both are negatived. This is shown by the very quotations made by the Government from the opinions of the Commission. The

fact that the rail carriers at one time subsidized the ships, that at another time they purchased space in the ships, relied on by the Government to show that the rail carriers could control the rate, to my mind, and, it seems to me, by every rule of right reasoning, shows exactly the opposite fact. If they could control the rate, surely they would not have been subsidizing ships or buying space in their bottoms to prevent the turning of more traffic from their lines. But we need not pause to discuss the proper conclusion to be drawn from this effort of the rail carriers "in times past." It is sufficient to rely upon the direct findings of the Commission. Without too much repetition, we may excerpt one or two paragraphs from the quotations made by the Government: At page 27 of the Government's brief, we find the following from the opinion in the Spokane case:

> "Passing for the time being the extent and effect of this competition at interior points, it must be found as a fact that there is real and active water competition between New York and San Francisco, between the Atlantic and the Pacific coasts, which does *limit* the rate of transportation which can be charged by rail between those points upon nearly every article which moves by rail";

and at page 26 the following:

> "This question of fact has been often considered in the past, and with but one unvarying result. The Circuit Court of the United States has twice found, once in a proceeding concerning these very rates to Spokane, *that active water competition does exist which controls the coast rate.* This Commission has repeatedly found and recognized the same fact. In the original hearing of the Spokane case we re-examined that whole question and reaffirmed our decision. In the recent hearing upon the applications of transcontinental lines for leave to disregard the rule of the Fourth Section

evidence has again been produced upon this subject which conclusively shows that the previous finding of the Commission is right. We had before us in the Spokane case the manifests of two ships from New York to San Francisco, and in the last hearing we had the manifests of two other ships. They showed in detail the articles transported, the point where they originated, the destination for which they were intended, and the rate under which they moved. These actual transactions prove more conclusively than any mere statement that almost every article which is the subject of ordinary commerce between the coasts can and does move from New York to San Francisco by water at rates materially lower than those maintained by the defendants by rail."

At page 29 we find the following:

"Competition at the present time seems to be more active. An independent line has been established upon the Pacific coast. The Panama Railroad has become an actual competitor for this business. The American-Hawaiian line, finding competitors in the field, has been compelled to reduce its charges. Testimony recently given before the Commission showed that a line of steamers had been put on from New Orleans which was actually handling consignments of lumber from New Orleans to San Francisco for 45 cents per 100 pounds and that shipments of lumber were moving from Memphis to San Francisco at 55 cents per 100 pounds, as against the present transcontinental rate of 75 cents. Everything indicates that the effect of this water competition will increase rather than diminish from now until the completion of the Panama Canal and when that waterway is open for business both rate and facility will be very much better than today. (R., pp. 182, 183.)"

At page 33 this:

"It would be the rankest discrimination to allow these carriers to make a higher charge at the

> intermediate point for the shorter haul unless they were *compelled by some cause beyond their control* to accept at the long-distant point less than a reasonable compensation for the service. Upon the question of fact the Commission is concluded by its previous findings in this case."

The whole trend of the opinions shows that the Commission found the coast rate to be a water forced rate. Not only is this so, but the fact that they allow an increase of 7 per cent. above the coast rate from Zone 2, of 15 per cent. from Zone 3, and of 25 per cent. from Zone 4, conclusively establishes the fact that they found that the coast rates of the rail carriers were compelled by water competition and absolutely negatives the statement of the Government, shown in their second subsidiary proposition, that these rates "are the result of the volition of the carriers."

The next subsidiary proposition of the Government is:

> *"In the Reno-Phoenix case the Commission found that the carriers had not shown that the existing rates to the terminals would not be reasonable if extended to the intermediate points."*

Even had the Commission made this holding, it would raise a question of law and would not be a finding of fact determinative of any issue. That legal question would be this: Is the burden upon the carrier, before it is entitled to relief from the rigid rule of the Fourth Section, to show that the rate at the terminal point would not be a reasonable rate if applied to each and every intermediate point? Is the burden laid upon it of showing the *per se* reasonableness of each and every intermediate rate before it can obtain relief at the more distant point? This ques-

tion of law we have discussed in our briefs, but I shall touch upon it later.

However, whether the carriers have or have not shown that the terminal rate would not be a reasonable rate if applied to intermediate points is not now of importance because the Commission, in establishing higher percentages from certain zones, has itself, of necessity, found that from those zones the carrier is entitled to higher rates to the intermediate points than to the terminal points.

The Government, in this proposition, moreover, seems to have fallen into error as to the meaning of the Commission. They quote an expression of Commissioner Lane as sustaining the proposition, saying:

> "Commissioner Lane concludes that the carriers involved have not established '*that the rates to the coast cities, if extended by them from eastern points outside the zone of water influence, are not fully compensatory.*'"

Commissioner Lane was not referring to rates generally from eastern points to the coast cities, but to rates from eastern points "outside the zone of water influence." What he meant by this is made clear by the opinion. The Commissioner treated the water influence on coast rates as commencing at the Atlantic seaboard and extending westward until it reached the eastern boundary line of Zone 1, where it was exhausted. The expression of the Commissioner, therefore, applies only to Zone 1 and is merely equivalent to saying the carriers have not shown that the rates to the coast cities are not reasonable rates to apply from points in Zone 1 to intermediate points. The Commission does not find that these rates are unreasonable, but holds that the burden of proof rests on the

carriers to show that the coast rates would not be reasonable rates to apply from Zone 1 to intermediate points; otherwise, no lower rate can be charged from that zone to the coast than is charged from that zone to the intermediate points.

The fourth subsidiary proposition of the Government is:

> *"In the Spokane case the Commission found that the terminal rates when applied to the intermediate points are reasonable as to Zone* 1, *and with the differentials fixed by the Commission are reasonable as to the other zones."*

The Government is mistaken; the Commission did not make the finding contended for in this proposition. The contention that it did is not sustained by the quotation made from the opinion; and, when other parts of the opinions are examined, is negatived. In the quotation reference is made to 550 rates suggested by the Commission as reasonable. These are the rates which were found by the Commission to be reasonable rates to Spokane in its opinion of June 7, 1910 (19 I. C. C. 162), but which were not ordered installed because they were considerably lower than the rates theretofore in effect and the Commission did not wish to order the installation of them until it should prosecute an inquiry as to how greatly the reduction would cut the revenue of the carriers. These suggested rates were not ordered in by the Commission, but its opinion shows that it was its purpose to avoid the necessity of ordering the carriers to install reasonable rates to intermediate points from Zone 1 or any other zone; that the problem it set itself was to adjust the rates by the Fourth Section order without the necessity of determining whether they were reasonable in themselves. It asks:

"1. What is the duty of the Commission under the present Fourth Section?

2. *Can the Commission under that section make an order in one or both of these cases which will obviate the necessity of prescribing a schedule of reasonable rates.*" (Rec., 156.)

Toward the close of the opinion in the Spokane case it says:

"We do not think that any further order should be made for the present in this case. It may be asked why the schedule of rates suggested by the Commission as reasonable should not be ordered in. The answer is that carriers should be permitted in so far as possible to adjust their own tariffs and that it seems probable that in compliance with this order carriers must establish rates in substantial accord with those suggested by us. It should be ever borne in mind that the acute complaint in this case is the discrimination and not the unreasonable rate. Obedience to this order will doubtless result in some rates from the east which are higher and in others which are lower than those suggested by the Commission since we did not then feel at liberty, as the complainants requested, to make the Spokane rate depend upon the coast rate. But it is likely that the resulting schedule will be more satisfactory to the complainants and no more burdensome upon the defendants." (Rec., 192.)

So the Commission did not find that the rates to the coast were reasonable rates to Spokane, but only found that rates from Zone 1 should not be higher to Spokane than to the coast, and fixing certain percentages as to the other zones, left the rates to be adjusted by the carriers with regard to these percentages.

As to rates involved in the Reno and Phoenix complaints, no suggestion of what were reasonable commodity rates was made. In the opinion of June 6, 1910,

there was a special reservation made of commodity rates for future consideration. (19 I. C. C. 238, p. 256.) Referring to that opinion, the Commission, in its opinion on the Fourth Section order, after noting that Congress amended the Fourth Section "before the Commission came to deal with the matter of commodity rates" (Rec., 70), said:

> "The Commission was proceeding to make such selection of commodities as seemed proper, when the law was amended as already noted, so that there arose the third alternative of giving application to the Fourth Section so far as Nevada's traffic was concerned. We have decided to allow our former order as to class rates to stand, and, instead of fixing commodity rates, proceed in accordance with the appeal of the original complaint, but more particularly in compliance with our understanding of the meaning of the new Fourth Section to seek an adjustment of the relation between the rates to the coast cities and the rates to the interior points." (Rec., 71.)

But suppose it were true that the Commission had found that the rates from Zone 1 to the coast cities, as they then existed, were reasonable rates to the interior points, would this remove the vice of the order? The command of the statute is that when the Commission finds any rates to be unreasonable to a given point, it establish to that point reasonable rates to prevail for a period named by it, not to exceed two years. It did not establish the coast rates as reasonable to the intermediate points or fix any rates then, but made those rates depend on the coast rate and ordered that they should be lowered whenever the coast rate was lowered, even though the rate to the intermediate point was absolutely reasonable and even though the lowering of the coast rate was brought

about by the unequivocal and undeniable compulsion of more acute water competition. In the Spokane case, for instance, where a specific order was made, it was, not that the coast rates be established at Spokane and maintained for a period of two years, but that for said period no higher rates to Spokane be maintained than those contemporaneously in effect to the coast.

The fifth subsidiary proposition of the Government is:

> *"The Commission found in the Reno-Phoenix case that the carriers have not shown that the charging of the present rate to the intermediate points is not unjustly discriminatory against those points in favor of the terminals."*

Even if this were true, it would not relieve the Commission from the duty of fixing a reasonable rate to the intermediate points in answer to complaints involving the establishment of such rates, nor permit them, by the establishment of arbitrary percentages between the coast rate and the intermediate rate, to force the carrier to establish a certain rate at the intermediate point irrespective of the question of whether it was reasonable in itself and irrespective of whether the coast rate was lower than was necessary to enable the carrier to successfully compete with water-borne traffic. But the proposition is not true as a statement of fact; it really involves a conclusion of law. As we have endeavored to show, and think have shown, the Commission found that the coast rate is one compelled by water competition. If this is true, and the coast rate is no lower than necessary to meet this competition, it cannot discriminate against the intermediate point even though the rate at that point is more than a reasonable rate. That

the coast rate is less than is necessary to meet the water competition will not be contended by the Government, for it contends that that rate is not forced by competition and may even be raised without loss of traffic—a contention not acceded to by us, but which it is worth while to note in passing.

The sixth subsidiary proposition is:

> *"The Commission found in the Spokane case that the exacting of a greater charge for the shorter hauls in excess of the differentials fixed by them would be an unjust discrimination against the intermediate points."*

If this proposition means that the Commission held, as an absolute fact, that the charging of rates different from those fixed by the percentages worked a discrimination against the intermediate points, if it means that the establishment of those percentages permits the carrier to maintain a reasonable rate at the interior point, and at the same time such lower rate at the coast as would permit it to compete for the traffic, it is denied by the whole findings of the Commission. If it means that the Commission may disregard the great underlying purpose of the statute that rates shall be reasonable, may disregard the fact that the carrier is entitled, under the statute, to a reasonable rate in every instance; if it means that the carriers are to determine discrimination, not according to the geographical position of localities, their advantages and their disadvantages, not according to whether the rate charged is reasonable for the service rendered, not according to whether the lesser rate at the further point is made to enable the carrier to engage in the traffic, not according to the rules of law prescribed for determining the reasonableness of rates; if it means—a

point to which the Chief Justice at the last term of the court suggested the contention of the Government's counsel led, and to which their present contentions still lead—that the Commission is a beneficent body extending or withholding good at its pleasure, then it involves a proposition of law which cannot be maintained.

The seventh subsidiary proposition of the Government is:

> *"The Commission gave due consideration and weight to every character of competition relied upon by the carriers."*

That it discussed all kinds of competition relied upon by the carriers is not denied, but that from the facts found by them they drew correct conclusions of law, or established valid orders, is denied.

II.

I shall consider together, without much attention as to following the order of the Government's argument, its second, third and fourth propositions. These are covered by our briefs and what I shall here say will be by way of amplification and emphasis with reference to the Government's present contentions.

In our briefs we contended that in determining the effect of the elimination from the statute of the words "under substantially similar circumstances and conditions" we must apply the well known rule that we must look to the old law, to the mischief and to the remedy; that we must see what had been the trouble produced by these words which it was desired to remove; that when we found the evil the inclusion of

these words in the statute wrought, we must conclude that their elimination was for the purpose of correcting this evil; that we must not presume that their elimination was to subvert the entire policy of the remainder of the law as well recognized and often declared; that in finding out the legislative intent we might refer to the legislative history. This method of discovering the meaning of the statute we then believed and now believe to be sound. Pursuing that method we found that it was the policy of the law that the carrier should make just and reasonable rates; that for every service rendered it was entitled to charge such rate, but that it was likewise the policy of the law that the carrier should be entitled to engage in competition and charge less than a reasonable rate when it was forced to do so by competition, without subjecting itself to the penalty of charging rates less than reasonable when the competition did not exist.

The legislative history, which is set forth quite at length in our brief, shows that the established policy of the law was not intended to be changed by the amendment, that no more was intended than to eradicate the evil which had sprung up under the statute as it was worded before the amendment. It shows that the evil which these words brought into the law was leaving it to the discretion of the carriers to determine in the first instance whether dissimilar circumstances and conditions existed, and to initiate the less rates to the farther points on their own motion. The view of the author of the amendment was thus expressed:

> "This amendment, stripped of its verbiage, means that the burden of proof must rest on the

railroad company to show why it does it, instead of on the shipper and the little community to show why the railroad should not do it. The railroad has all the facts. It merely shifts the burden of proof. The railroad claims the right to charge more for a short than for a long haul. All right, if conditions exist, let them show it and let them take advantage of it. It shifts the burden of proof. That is all there is in the amendment. Can any reasonable objection be made to it?'' (Appellees' Brief, p. 66.)

But the Government says this is not true; that the burden of proof has always been upon the carrier, and it quotes what is said by Judge Cooley. But the statement of Judge Cooley is not at war with the statement of Senator Dixon, nor at war with what has been the well understood rule as to the burden of proof. If the carrier in the first instance went before the Commission asking to charge less for the longer than for the shorter haul, included within the longer, it had the burden of showing why it should do this. If, acting on its own volition, it made such charge and a complaint of discrimination was filed against it, in this action it would not be permitted to continue the lesser charge at the farther point, unless there appeared the dissimilar circumstances and conditions justifying it. In this sense it may be said to have had the burden of proof. But without any order from anybody, on its own judgment and of its own determination, it could make the less charge to the further point. As an initial proposition the burden was laid on it to justify its action to no one and it was only after complaint filed and proof made that its wrongful act in fixing the lesser rate, if it was wrongful, could be corrected. So the senator was quite within the bounds of proper de-

scription when he declared that the only effect of the change was to shift the burden of proof. If a more precise statement is required, it may be said, as we have said in our brief, that the effect of the change was to prevent the carrier from the initiation of the lesser rate to the further point until it had submitted to the Commission the question of whether there were dissimilar conditions warranting this rate and obtained its ruling on this question.

But the Government says this is altogether wrong; "that it was certainly intended there should be some change *in the principles by which the rights of the carriers and the opposing localities, and the public generally, should be determined.*" (P. 58.) The Government nowhere finds warrant for this assertion. It is certainly not found in the legislative history of the act; it is certainly not found in the judicial construction which has been had of it; it is certainly not found in its well known policy. All these show that it has ever been recognized that a long and short haul clause which could not be departed from, a clause which would not permit the carriers to freely engage in traffic at the further competitive point, while receiving reasonable rates at the intermediate non-competitive point, was stifling to commerce, unjust to carriers, unfair to communities eligibly situated in depriving them of their natural advantages, and in every way impolitic and unwise. They show that the great purpose of enacting the Interstate Commerce Law was to bring into being a statute which would be an aid to commerce and that the purpose of embodying within it a long and short haul clause was to enact a rule with elasticity enough to permit the charging of more for the shorter than for the longer haul when the circum-

stances surrounding the carriage are so dissimilar as to show it to be a proper economic and transportation policy, but with inflexibility enough to prevent frittering away the purpose of the act to secure reasonable and non-discriminatory rates. It must always be remembered that the same commercial conditions, the same transportation and traffic necessities, which called for the charging of the lower rate for the longer haul than for the shorter before the elimination of the words "under substantially similar circumstances and conditions" call for it now. It was because of these commercial, transportation and traffic necessities, that the *proviso* of the long and short haul clause was enacted. But if these conditions still remain, if the re-enactment of a flexible, instead of an absolute, clause was had in view of these conditions, then the true rule of construction is that no effect should be given to the elimination of the words which would destroy or interfere with the purpose of the act to aid commerce and permit the carriers to meet competition at the more distant point. That the policy of the law was not intended to be overthrown; that it was not intended that there should be a change in its principles, as is argued by the Government, I think is made plain by the second *proviso* of the amendment, which is as follows:

> "No rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission in accordance with the provisions of this section until a determination of such application by the Commission."

Here the law recognizes the principles under which higher rates have been fixed for the shorter haul included within the longer. It realized that there might be rates lawfully existing because of competition, but it also realized that there might have been established rates unwarranted because of any competition on which they professed to be based—that the competition did not exist in fact or was not potent to warrant the lesser charge. The law-making body did not intend to overthrow the effective influence of any genuine competition recognized before the passage of the amendment as proper to warrant the making of the less rate to the more distant point, but it did intend that wheresoever such competition did not exist and the Commission found this fact, that the higher rate for the lesser distance should be abrogated where already installed and not permitted for the future. Had Congress intended to overthrow the general principles which for years had been recognized as warranting the greater charge for the shorter distance they would have done so, not by inference, but by specific declaration.

Our contention is further borne out by the last clause of the Fourth Section. It is not there provided that water competition shall warrant the higher charge for the shorter distance, but it is recognized that such competition does warrant it. The desire is to place a limitation on the right of the carrier to return to the higher rate after having adopted the lower because of water competition. To do this it is not necessary to declare the potency of water competition to warrant the lesser rate. This is an accepted fact. All that is required is to single out this particular kind of competition from other kinds of competition, recognized as war-

ranting the lesser charge for the longer distance, and to declare the limitations which are to attach to the fixing of rates because of this competition.

We leave this argument for a time, but at the expense of some repetition shall return to it in a few minutes in discussing another contention of the Government.

At page 44 of its brief, after quoting passages from both opinions of the Commission, the Government declares that the construction given by the Commission to the amendment of the Fourth Section is:

> "First, that the burden is upon the applying carrier to show that the greater charge for the shorter haul will not result in unreasonable rates to or work an unjust discrimination against the intermediate point; and Second, when such fact is established the Commission *must* grant relief against the hard and fast rule of the section, and this relief *must* extend to the point where unjust discrimination will arise. In other words, that a carrier is vested with a lawful right to charge any rate which is reasonable within itself and is not unjustly discriminatory, and the Commission is under legal compulsion to grant such right." (P. 44.)

After finding that this is the Commission's construction of the amended Fourth Section and apparently approving the construction, the Government asks:

> "When, then, is a charge of a larger sum for a shorter haul embraced in the longer haul an unjust discrimination within the meaning of this section?" (P. 45.)

Notwithstanding the Commission's construction as declared by the Government, at some pages later it answers the question that is propounded by saying:

> "When this phrase 'under substantially similar

circumstances and conditions' was stricken out, not only did the prohibition of the statute become effective in the absence of an application for relief by the carrier, *but also this implied right to make the greater charge for the shorter haul, when circumstances and conditions are substantially different, was taken away.* Now, the section declares broadly *and unconditionally* that the greater charge for the shorter haul shall not be made unless relief be obtained from the Commission. Before, when the shorter haul rate was reasonable within itself, and the longer haul rate was a necessity to get the business, but brought some returns over cost, the carrier had the right, *declared by statute,* to make the discrimination, and no other facts or circumstances could deprive it of that right. Now, as this right which was given the carrier by the omitted phrase no longer exists, we must look elsewhere to ascertain what the Commission shall take into consideration in determining whether the discrimination is a just one or not." (P. 59.)

And the Government reaches this, to me, strange conclusion:

"It conclusively appears, therefore, that since the striking out of the 'substantial similar' phrase, the fact that the charge for the shorter haul is reasonable and the charge for the longer haul is forced, but is to some extent remunerative, while very material elements, are not conclusive reasons for allowing the discrimination, and do not impose the legal duty upon the Commission to hold the discrimination a just one; but the Commission may even in such a case view the whole situation from the standpoints of both localities and the public at large, as well as the carrier, and draw therefrom a conclusion which it deems to be just.

There is no just reason why the Commission in the inquiries here involved should have closed their eyes to every circumstance and condition other than whether the charges for the shorter hauls to Spokane and other intermediate points

were reasonable within themselves, and whether the rates to the terminals were forced, but to some extent remunerative. *When such facts alone are considered, the inquiry is confined wholly to the welfare of the carriers.* The Commission is made to place itself at the carrier's point of view, and to entirely leave out of consideration the interests of the public and the respective interested localities. It is made to hold that the carriers *must* be allowed to charge a reasonable rate to the intermediate points, and *must* be permitted to reduce its rates so as to get the business at the terminals, provided some returns over cost of service are received, regardless of the injury that may thereby be inflicted upon the public or the intermediate points.

Such is not the law since the 'substantially dissimilar' clause was stricken out. Conditions may arise under which a carrier may be compelled to reduce its rate below what may be regarded as a reasonable charge in order to avoid unjust discrimination, or when it will not be permitted to reduce its rate to a certain point merely for the purpose of securing business, though it may not be able to procure the business otherwise, and such rate may bring some return above cost." (P. 64.)

The conclusion, then, is, though the terminal rate is forced and placed at a point necessary to obtain the business, though the intermediate rate is reasonable in itself, the Commission is not called upon to establish the reasonable intermediate rate, is not called upon to allow the forced terminal rate, but is permitted to wander afield and if its judgment in the interest of some community is that the intermediate rate may be made less than reasonable or the terminal rate raised to a point where it will not secure the business, the Commission can so adjust the rates. We have no fear that a proposition such as this will be sustained. We have always understood the law to be,—we now understand

it to be,—that if the intermediate rate is reasonable, the lesser terminal rate forced by competition, there can be no undue discrimination. But the contention of the Government is that this is not true; that it is for the Commission to declare without any guidance from the statute that in this case the discrimination may be undue, and depress the intermediate rates below the point of reasonableness and at the same time raise the terminal rate to a point where it will not carry the traffic.

We have quoted above the construction of the amended Fourth Section by the Commission as declared by the Government. The Government says:

> "when the constitutionality of the act is established, it is not understood that counsel for the carriers contend for a more favorable construction of the section than this."

How the Government could have come to this conclusion we are at a loss to understand. We have all along contended that on a Fourth Section application the carrier is not called upon to show the reasonableness of the intermediate rates. The declaration of the Commission that before we are entitled to relief from the rigid rule of the Fourth Section at the terminal points the burden of proof is upon us to show the reasonableness of the intermediate rates we have combated and now combat as altogether unsound. The purpose of the Fourth Section is to permit the carriers to meet the competition at the terminal points. When that competition and the force of it is shown, the carriers have the right to establish a rate there lower than the intermediate rate,—a rate low enough to meet the competition. When a rate no lower than this is established at the terminal point it cannot un-

duly discriminate against the intermediate point, no matter what may be the rate at that point. If the rate is no lower than sufficient to meet the competition, all that it does is to enable the rail carrier to share in the traffic. If it were entirely removed, the water carrier would still get the business, the discrimination would still exist against the intermediate point. This discrimination would be wrought, not by the rate accorded to the rail carrier, but by the existence of the water carriage—the location of the terminal point. This is not to say that a rate higher than the point of *per se* reasonableness does not work an undue discrimination against the point where it prevails, but the distinction must be clearly drawn that such discrimination is not wrought by the fact that reasonable rates or competitive rates less than reasonable are accorded to places entitled to them—the according of these rates cannot work the discribination proscribed by the statute—but by the fact that in fixing the intermediate rate higher than reasonable the First Section of the statute has been disregarded. The means provided by the statute for correcting this wrong is not the denial or limitation of a Fourth Section application by forbidding or restricting the right to compete, but is for the Commission, on complaint or of its own initiation and on its own investigation, to reduce the excessive rate to the point of reasonableness. In these intermountain cases there are many thousands, in fact hundreds of thousands, of intermediate rates involved, and we cannot attribute to the law-making power the intention that the carriers should show that all of these rates are reasonable before they are entitled to relief from the rigors of the Fourth Section. As we have seen in our brief, in the course of the amendment of the Fourth

Section amendments were offered to the effect that the carriers should be entitled to charge the less rate to the further point upon authorization of the Commission, provided they showed that the intermediate rates were reasonable. The impossibility of complying with any such requirement became evident to Congress and the provision was not embodied in the amendment, but the Commission now proposes to insert it and, by such ruling, enacts legislation which Congress declined to enact.

The Government not only contends that the law now is that before the carrier may obtain relief from the rigid rule of the Fourth Section, it is bound to show that the intermediate rates are reasonable, but that such was the law prior to the amendment of that section and that this is shown by the decisions of this court. We have never so read or understood those decisions, and we view the proposition with surprise. The Government relies on some expressions in the opinions of this court, but those expressions do not sustain its position. For example, this quotation is made from the E. T. V. & G. case, 181 U. S.:

> "In a supposed case when in the first instance, upon an issue as to a violation of the Fourth Section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the Third Section of the act forbidding the making or giving of an unreasonable preference or advantage will not apply." (P. 52.)

But in using this language the court was not determining whether the carrier on an application should be relieved from the rigor of the Fourth Section, was not declaring that before such relief could be given it must show the intermediate rates to be reasonable, but was pointing out and making clear the fact that when the intermediate rate was reasonable and the further rate forced by competition, the disparity in the rates was not an undue discrimination.

But even if it were true—and we could never remotely, even, concede it to be so—that before the carriers are entitled to charge the less rate at the further point under the *proviso* of the Fourth Section, they must show the intermediate rates to be reasonable is the fact of importance in the attitude of this case. The Commission has found that the carriers are entitled to relief under the Fourth Section. It has prescribed an order professedly granting such relief and the question is whether that order gives them the relief to which they are entitled under the mandates of the law. It will not do for the Commission to say: "The carriers are not entitled to relief because they have not discharged the burden laid upon them of showing that the intermediate rates are just, but we will nevertheless grant them a measurable degree of relief. In doing so we will not prescribe it according to the mandates of the law and in the same way we would have prescribed it if they had shown their intermediate rates to be reasonable." Having found that the carriers are entitled to relief, it must grant such relief as the law contemplates, that is, relief permitting the charging of a reasonable rate at the intermediate point and a rate at the coast low enough to meet the competition.

The Government devotes several pages in criticism of the method of making rates established by the carriers and makes a somewhat extended argument at pages 65 *et seq.* to show how unjustly this method works between Reno and Sacramento. But while the Commission reduced the class rates from the east to Reno, it made, and rightly made, for water competition forced it, the same character of adjustment from the east to Reno. The first class rate from New York to Sacramento was $3. The Commission in its order of June, 1910, established a first class rate from New York and common points to Reno of $3.50. (Rec., 20.) In the case of *Traffic Bureau of the Merchants Exchange of San Francisco* v. *Southern Pacific Company*, 19 I. C. C. 259, the Commission established a first class rate from Sacramento to Reno of 85 cents. So under the Commission's own orders if 20,000 pounds of first class freight moved from New York to Sacramento it paid $600; if it moved directly to Reno it paid $700. Whatever of criticism might justly be made is not of the method of rate making, which is forced by a power more potent than the Commission or the carriers, but would be that the rates of the carriers were higher than they ought to be or that those of the Commission are lower than they ought to be.

We wish to here direct the attention of the Commission to the argument made by the Government in this behalf, and especially to what is said by it at pages 72 and 73 of its brief. In order that this part of the Government's argument may be brought immediately to the intention of the court, we here copy it, as follows:

> "As to the traffic which originates in the Middle West, the discrimination in rates to the ter-

minal and intermediate points is still more clearly inexcusable. This intermountain region would consume the same amount of goods regardless of where they are produced. If the favorable rates which it is claimed are created by ocean competition had been confined to localities on or near the Atlantic coast, all this merchandise would have been manufactured there. Moreover, the merchants on the Pacific would have had just as many and favorable markets in which to purchase, because the markets which have been created by the railroad policy in the Middle West would have arisen, under the other policy, near the Atlantic coast. Furthermore, these continental lines would have carried the same amount of traffic, and each, through its eastern connections, would have secured its reasonable proportion. Hence, the general policy was not adopted to aid the Pacific coast terminals, *and there was no necessity whatever for granting the same rates to the Middle West points as to those on the Atlantic, and the pretense of forced rates behind which the carriers seek to hide has no application to this very important phase of the situation.* There were two motives by which this policy was inspired: First, it was to the advantage of the western lines, because if the traffic originated with them they retained the pay for the entire haul. This motive was pure selfishness, as they would have received, as they do now receive on traffic originating on the Atlantic, a reasonable compensation for the haul. (See 19 I. C. C. Rep., 162, 172, where examples are given, showing the proportion of the through charges which go to the western carriers.) Second, it was greatly to the advantage of the cities situated in the Middle West, whose phenomenal growth has largely resulted therefrom. And these two motives have stretched that marvelous blanket from the Atlantic coast to Denver, two-thirds of the way across the continent. Here the carriers deliberately said to these middle western cities, *without being moved thereto by any compelling force arising out of advantage of location*

or otherwise, that they would aid them in their commercial contest with their eastern rivals."

This argument embodies several propositions which seem to me remarkable and untenable: First, it implies that the competition of markets and the competition of rail carriers—all competition, indeed, except that of water carriers—is to be disregarded in the fixing of rates. Second, it declares that the effort of a rail carrier serving a community in the Middle West, and having no line extending to the Atlantic seaboard, to carry the manufactures and products of that community in competition with like manufactures and products of communities situated on the Atlantic seaboard, is "pure selfishness" and subversive of the act. Third, it imports that the Pacific coast must be preserved as a consuming market for the Atlantic coast as a producing market. Fourth, it imports that it was not the intention of Congress that the inexorable laws of competition should have fair play as to the cities of the Middle West, but that the growth and prosperity of these cities should be circumscribed by artificial and unnatural laws. Fifth, it holds that the existence of the water competition at the Pacific coast has no effect upon rates on traffic originating in the Middle West; that the only competition affecting these rates is the competition of markets and the competition of carriers. And it is to be remarked that this great change in the law is all brought about by the elimination from the Fourth Section of the words "under substantially similar circumstances and conditions."

What we have said in our briefs and what has been said in this argument, I trust, indicates to the court quite distinctly how radically we differ from the posi-

tion of the Government, and shows the reasons on which that difference is founded. I shall pursue the argument somewhat further and in so doing shall return to a consideration of the true meaning of the amended section and of the effect of the omission from it of the eliminated words. It cannot be doubted that the amendment of the Fourth Section was not intended to subvert the entire policy of the law as it had before existed. It cannot be successfully contended that its purpose was to overthrow the competition of markets. It cannot be successfully contended that its purpose was to forbid one carrier's meeting at a terminal competitive point a rate another carrier, without discrimination against any intermediate point on its own line, has established there, although except for the competition the first carrier could not itself, without discrimination against its intermediate points, install so low a rate at the terminal point. That the amendment to the act did not intend to do away with any legitimate competition theretofore existing we think is shown by the history of the passage of the amendment, by what is omitted from it, and by what is contained in it. We need not at this point amplify on the legislative history of the amendment, as that has been sufficiently referred to elsewhere. As to what is omitted from it, it is pertinent to say that at the time it was enacted market competition, the competition of rail carriers with each other, and the competition of rail carriers with water carriers, were all well established and well recognized legitimate forces for the reduction of the rate at the further point. They had been emphasized in congressional debates and committee reports; they had been recognized in rulings of the Commission; they had been made firm by the declarations

of the courts. These forces were not brought into being, were not permitted to exercise their influence on the fixing of rates by the embodiment in the statute of the words "under substantially similar circumstances and conditions." If so, then the elimination of these words would not only have destroyed the potency of market competition and of the competition of rail carriers among themselves to permit the lesser rate at the further point, but would likewise have destroyed the potency of water competition to permit such rate. If these words gave birth to the right to make the lesser rate at the further point on account of market competition, on account of the competition of rail carriers among themselves, they likewise gave birth to the right to make such rate on account of the competition of the rail carrier with the water carrier. If subtracting them from the statute has taken away the right of the carrier to make the lesser rate on account of market competition and on account of the competition of rail carriers among themselves, it has likewise taken away this right on account of the competition between rail carriers and water carriers. The clause which breathed vitality into one breathed it into all; the elimination of the clause, which means the death of the one, means the death of all. We may well conclude, then, that if the legislative body intended to withdraw from the ken of the Commission any character of competition which had theretofore been regarded as sufficient to warrant the lesser rate at the more distant point, if it intended to take away the influence of any competition to give such warrant, it would have done so by affirmative words and not have left the matter to conjecture, inference or construction. Especially must we conclude—indeed, the conclusion is inexorable, in-

escapable—that if the law-making body had intended to destroy the force of market competition and rail competition to fix the lower rate at the further point, and at the same time continue the force of water competition to fix such rate, it would not have done so by the elimination of words which had all the while been held as applying equally to all these kinds of competition, but would, by specific declaration, have removed the influence of those particular kinds of competition it intended to be no longer operative.

As to the statement that the statute by what it does declare shows that it was not intended to destroy the force of any kind of competition previously recognized as effective to bring about the lower rate at the further point, we say: The act recognizes all lesser rates at the further point *theretofore lawfully existing*. But such rates lawfully existed if they were founded upon competition which was real and substantial, whether that competition was the competition of markets, the competition of rail carriers among themselves, the competition of rail carriers with water carriers. If the competition was not real, was not substantial, then it did not lawfully exist. The very last paragraph recognizes the existence of various kinds of competition, water competition and others, but it wishes to prescribe a certain rule to govern as to water competition, and does prescribe such rule. If it was intended to eliminate market competition and rail competition, the two kinds of competition which prior to the amendment had been effective along with water competition to produce the lower rate at the further point, why would the statute declare "Whenever a carrier by rail shall, in competition with water route or routes, reduce the rates"? If the only kind of competition that

was left was water competition, why this clear recognition of other kinds of competition? If the reduction was made because of the competition of markets, because of the competition of rail carriers, the carrier, upon authorization of the Commission, could raise its rates, but if water competition was the cause of the reduction of the rates, then it could not later raise the rates if the cause of the increase depended solely upon the elimination of the water competition.

Under the view which I hold, however, which is pointed out in our briefs and which, as I understand it, is sustained by the Supreme Court in the Behlmer case (175 U. S. 648), the competition which the cities of the Middle West and the carriers serving them meet at the coast is not merely market competition, is not merely the competition of the rail carriers, but, in any right definition of the term, is the competition of rail carriers with water carriers.

The Government also makes strictures upon the fact that there are a number of points to which terminal rates are applied that are not reached by water. Were it important to do so, the reasons why these points were given terminal rates could be pointed out, and they would be found to be good reasons, but the propriety or impropriety of making them terminal points and extending to them terminal rates is removed from the field of this discussion, for though some criticisms were indulged in by Commissioner Lane the Commission when it came to make its orders and to establish its percentages treated these points as terminal points and gave them the benefits of the terminal rates.

III.

The fifth proposition of the Government is: "THE COURT ERRED IN HOLDING THAT THE ORDERS OF THE COMMISSION ARE VOID BECAUSE THEY ATTEMPTED TO DETERMINE THE RELATION OF LONG AND SHORT HAUL RATES." (P. 76.)

It is said under this proposition:

> "Counsel (for appellees) did not choose to advance any course which the Commission could legally pursue to comply with this meaning of the statute until the reply brief of the Atchison, Topeka & Santa Fe Railway Company was filed in this court."

In our main brief we discussed what we believed to be the meaning of the word "extent." In our supplemental brief we showed what would be a proper order of the Commission, even if the word had the meaning attributed to it by the Government and that even giving it this meaning it did not apply to a relation of rates. Here we might be content to let the discussion rest, but in view of the argument now made by the Government I shall again touch upon the subject. My view is very firm that the word "extent" has nothing to do with the question of rates. I do not see how without violating well recognized canons of construction, it can be held to have anything to do with that question. The words "and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of the section" are not new words in the statute. They have been there all the while. Prior to 1906 the Commission had no power of fixing rates. When the same words are found in the same connection in re-enactments of a statute they must be construed as carry-

ing the same meaning they carried in the former statute unless it is apparent that they are used with a different meaning. Now, when these words were contained in the former statute, the Commission had no power of fixing rates, or of declaring the relation of rates and, hence, they could not have referred to these things. The "extent" to which the carrier might be relieved had to do with considerations other than the amount of the rate or the relation of rates. The words were in the section as proposed in the Senate prior to the insertion of the words "under substantially similar circumstances and conditions." They had to do with the territory where and the circumstances under which the carrier might be relieved. There might be conditions seeming to call for the relief of the carrier, which after investigation by the Commission would really show no demand for such relief. The application for relief might embrace cases where the Commission would find that the relief should be granted and other cases where it would find the contrary. All these things were embraced under the word "extent." That word in the former law had a meaning. That meaning could not refer to the fixing of the relation of rates and, hence, it should not now be held to refer to this.

An examination of the statute shows, as I think, the correctness of this conclusion. It is declared now, as it was declared before the amendment, that the carrier shall charge no more for the shorter than for the longer haul, and there then comes the *proviso:*

> "*Provided*, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property."

Here, then, is the general inhibition and the exception from it. The inhibition is that more must not be charged for the short than for the long haul. The exception is that in special cases, after investigation, the Commission may authorize the greater charge for the shorter haul. The word "extent" is not used here. The sentence is not that the Commission, after investigation, in special cases may authorize the less charge for the greater haul and prescribe the "extent" of the difference in such charge; is not even "and may prescribe the extent to which such designated common carrier may be relieved from the operation of the section," but the immediate thought of the act is complete when it is declared that the carrier may be authorized by the Commission to charge less for the longer than for the shorter distance for the transportation of passengers and property. All that is to be done at the time of passing upon the application is now prescribed and ended. But it may be that conditions will change, new competitors may enter the field, or all competition may be removed. An entirely new clause is added to the effect, "and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

The purpose and meaning of the section in the old law were, and in the new law are, I think, this: The carrier in every instance had and has the right to initiate rates. It was and is the policy of the law to leave it free in this particular so long as it is guided by the First Section of the act, declaring that rates shall be reasonable and the Third, declaring they shall not be discriminatory. The carrier could better tell than the Commission just what was the force of the

competition it would have to meet and just what was the rate it would have to install in order to meet it, it would not be presumed that the carrier would establish an unlawful rate, but that it would establish one under the commands of the law. If it did violate the Third Section, upon complaint this rate could forthwith be corrected by the Commission. Not alone is this true under the new law, but now if it installs a rate which is unduly discriminatory and hence unjust, this rate can be immediately suspended by the Commission and promptly set aside so as never to become effective. The purpose, then, of the law, as I think, was that the carrier should apply to the Commission for relief from the inhibitions of the Fourth Section. If the Commission found that the circumstances existed warranting such relief it should grant the application and enter an order that the carrier might charge less at the more distant point. If, taking advantage of the order, the carrier should inaugurate a rate unduly discriminatory because less than necessary to meet the competition, on complaint the rate could be corrected or even without complaint on the Commission's own initiative it could be suspended, investigated and corrected. This construction is in keeping with the whole theory of the law.

But in view of the contentions of the Commission and the Government we filed our supplemental brief to show that even if we were wrong, even if the word "extent" had the meaning attributed to it by them, the proper method of disposing of an application would not be by fixing a percentage relation of rates where the intermediate rate might not be reasonable in itself, nor the terminal rate accomplish the purposes for

which it was installed. The Commission, as we have seen in our brief, found no difficulty in its opinion in declaring its power to prescribe "the extent," as we there suggested it ought to be prescribed if the word had the meaning it attributed to it, by fixing a minimum below which the carrier could not go; but after the decision of the Commerce Court and the appeals to this court, in its annual report it declared that under the law it had no such power, it could only fix the relation of rates. It finds no warrant for fixing this relation in the law any more than it finds warrant for fixing a minimum, but it says the law must have meant this because there was no other way in which the meaning of the act could be carried out. Clearly a *non sequitur*, for, if the right to fix a relation may be implied, equally may the right to fix a minimum be implied, and much more logically, for this course more nearly comports with intent of the law and much more freely allows the harmonious play of all its parts.

If the word "extent" has the meaning attributed to it by the Commission and the statute does not declare how the extent shall be prescribed, then it is to be implied that in fixing the "extent" the Commission is to do that which preserves the policy of the law. That policy was that the carrier should compete at the further point, but in so doing should not discriminate against the intermediate points. If, now, the establishment of a certain rate will meet the competition and, within the meaning of the law, the establishment of a rate lower than this is discriminatory, the way to prevent the discrimination, to fix the "extent," assuming it to have the meaning claimed by the Government, is to provide a minimum below which the car-

rier cannot go. In this way competition is met at the more distant point and a reasonable rate preserved at the intermediate point.

IV.

The other points made by the Government are sufficiently covered in our briefs and will be so referred to in the oral argument as to obviate the necessity of further discussion here.

Respectfully submitted,

F. C. DILLARD,

Solicitor for the Union Pacific Railroad Company, the Southern Pacific Company, the Oregon-Washington Railway and Navigation Company, the Oregon Short Line Railroad Company.

FILED.
FEB 20 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1911.

~~Nos. 883, 928, 884, and 929.~~

UNITED STATES OF AMERICA

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND SIXTEEN OTHER RAILWAY COMPANIES.

UNITED STATES OF AMERICA

vs.

UNION PACIFIC RAILROAD COMPANY AND TEN OTHER RAILROAD COMPANIES.

INTERMOUNTAIN RATE CASES.

APPEALS FROM THE COMMERCE COURT.

SUPPLEMENTAL BRIEF AND ARGUMENT IN BEHALF OF THE APPELLEES.

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Lest the position taken in Sub-sections (*c*) and (*e*) of Section III of our main brief should be misunderstood, lest it might be thought that we

regard the maintenance of that position as essential to our contention that the Commission exceeded its powers in establishing fixed percentages between the terminal and the intermediate rates, we have deemed it well to file this supplemental brief.

The position referred to, is that in which we discuss the meaning of the word "extent" as used in the fourth section of the Act. The view taken in our main brief as to the meaning of that term, as there used, is supported by the following considerations: That the fourth section, with its proviso, so far as here involved, is the same now as before the amendment, excepting the elimination of the words "under substantially similar circumstances and conditions;" that when there is controlling competition at the more distant point the purpose of the fourth section, both before and after amendment, was and is to allow the carrier to charge the less rate at that point; that the construction which had been given to the eliminated words left the carrier to determine the existence and effect of the competition and to inaugurate the lesser rate at the further point without a previous finding from the Commission, and that this was the evil to be corrected; that the whole theory and policy of the law is that the carrier shall initiate its rates; that when there is discrimination in rates the correct order to be entered by the Commission, and the one which it regularly enters, is a direction to the carrier not to make a change in either rate,

but to remove the discrimination; that the words "the extent" were in the law at a time when the Commission could not prescribe rates and hence had no reference to rates; and that the rule of construction is that when the words of a statute are carried forward into an amendment they are presumed to have in the amendment the same meaning which they had in the unamended statute, unless a contrary intention clearly appears. Because of these considerations we have contended that an application under the fourth section only calls upon the Commission in the first instance to determine the fact of competition; and that when this is ascertained it is its duty to relieve from the prohibition of that section and enter an order accordingly, leaving the carrier to inaugurate its rates under the guidance of the other sections and subject to correction if those sections are violated.

That the sustaining of this view of the law is not necessary to our contention as to the invalidity of the Commission's orders is shown on pages 109 and 110 of our brief, but we wish here to go a little more elaborately into the argument.

If the construction contended for in our main brief is too narrow, if the term "extent" means that the Commission in granting a fourth section application shall make an order, which, while authorizing the lower terminal rate shall yet prevent undue discrimination against intermediate points, in what manner shall this be accomplished?

It is plain from a reading of the amendment of

June 18, 1910, and from the debates in Congress attending its enactment, that the only purpose of the amendment was to take from the carriers their unrestrained freedom to make lower rates to a more remote point when circumstances and conditions were different there, from those existing at a nearer point, and to require them in the first instance *to show cause* for doing so. As stated by Senator Dixon, who was the author of the amendment, "the amendment * * * *simply shifts the burden of proof* on the railroad company *to show cause* why it should charge more for the short haul than the long, instead of letting it rest on the shipper as it is under the present Interstate Commerce Act." (Cong. Record, vol. 45, 61st Cong., 2d session, p. 5998.) This showing being made, this burden having been borne, the right to relief followed and is recognized by the Commission as following; and no one can examine the debates attending the passage of the amendment in the light of the decisions of this Court in the *Alabama Midland Case* (168 U. S., 144), the *Behlmer Case* (175 U. S., 648), and the *East Tennessee Case* (181 U. S., 1), without reaching the conviction that Congress intended it should follow.

But what must the showing be? The answer to this we think will appear from a consideration of what that "burden" was which the complaining shippers and communities had to bear, and of which, as Senator Dixon stated, it was the purpose of the amendment to relieve them. Should an in-

termediate point, as, for example, Spokane, complain that the rates from Chicago to Seattle were less than the rates from Chicago to Spokane, the charge thus made would be strictly one of *discrimination*. No issue as to the intrinsic reasonableness of the rate to Spokane would be raised by such a charge. That issue might be raised; indeed, in the Spokane complaint it *was* raised; but it was raised *by an independent averment* that the rates were unreasonable and violative of the *first* section. The mere complaint of any community that another community's rates are less for the same service is (unless accompanied by other averments) a charge that the other community is being *favored*, and is not a complaint that its own rates are too high.

Now, to sustain this charge of discrimination it was necessary for the complaining community to show that the circumstances and conditions existing at the more remote point *did not* require lower rates there. This, in practice, was a difficult thing to do; and the purpose of the amendment was to relieve the complaining shippers and communities of the burden of proving this, and to require the carriers to show affirmatively that those circumstances and conditions *did* compel lower rates at the more remote point; that that point would get such rates anyway; and therefore that discrimination could not result from their being made by the rail carriers.

This being true, and it being granted for the

sake of argument that the words "the extent" not only authorize but require the Commission in the first instance to make an order under which the carrier can not discriminate at the terminal point, the thing for the Commission to do—the only thing it properly can do—is to find what rate there will permit the carrier fully to meet the competition, and to enter an order under which the carrier may fix less rates at the terminal point than at the intermediate point, so long as it does not fix a rate less than a given minimum.

If the term "extent" has the meaning last attributed to it, clearly the Commission must proceed in this way to fix the "extent." It may very properly find that some rate at the more remote point will not result in undue discrimination against the intermediate point, and such a rate the carrier is unquestionably entitled to make, without any regard to intermediate rates, provided always that such rate will yield something in excess of the cost of hauling the traffic moved under it. The function of the Commission on these aplications, if "extent" has the meaning indicated, is to ascertain what that rate is, and to permit the carrier to depress its rates at the more remote competitive point, *without regard to intermediate rates*, to the lowest point short of the point of undue discrimination.

To illustrate: Let us suppose the existing rate from Chicago to San Francisco to be $1, and that upon that rate the rail carrier moves *some* busi-

ness to San Francisco in competition with the water lines. To meet *fully* that competition, however, it may be supposed that a rate of 80 cents would be required, and that such a rate would yield the rail carrier something in excess of the cost of movement. Upon application to the Commission for leave to continue in effect at San Francasco rates lower than at intermediate points, the Commission would ascertain the rate necessary to meet fully the competition found to exist at San Francisco, and finding it to be 80 cents it would authorize the carrier to make a rate that low, if the carrier saw fit to make it, and to maintain it without regard to intermediate rates, because it could not possibly result in undue discrimination against intermediate points. But as it would have been ascertained that a rate of 80 cents would meet fully the competition of the water line, and enable the rail carrier to get and move its traffic as against that line, a rate less than 80 cents would discriminate unduly against intermediate points, and it would forbid the rail carrier to make it.

It is said that this is to fix a minimum, and that while the Commission was, in 1906, empowered to fix a just and reasonable rate to be charged as a maximum it has never been empowered to fix a minimum. But it has always had power to correct undue discrimination, on complaint under the third section, and we think that as the law now stands it has power to prevent it in this way in

disposing of an application under the fourth, if the term "extent" has the meaning claimed for it. And in the report of the Spokane case the Commission, speaking through Mr. Commissioner Prouty, asserts that it does possess this power, saying, with reference to its authority to determine the extent of the carrier's departure from the long and short haul clause:

> "This authority can be exercised by prescribing the maximum difference which may be against the intermediate point, *or by fixing a rate at the more distant point below which the carrier must not go,* or by defining the territory from which the highest intermediate charge may be made" (Rec., No. 883, p. 173).

The objection made by the Commission in its annual report, that only by the method pursued in the orders here under consideration could discrimination be prevented, is in this way fully met; and the Commission in pursuance of this method might have entered orders which would be free from the essential objection lying against the orders actually made; for this method keeps the terminal competitive rate, as it should be, absolutely independent of the intermediate non-competitive rate, until it is carried down to a point where undue discrimination would result from its being lowered further, and that point is definitely fixed; whereas by the orders here under attack the Commission has tied terminal and intermedi-

ate rates together, and without regard to the intrinsic reasonableness of the intermediate rate, or the non-discriminatory character of the terminal rate, has required that *any* lowering of the latter must carry the intermediate rate down with it.

The ineradicable vice of the Commission's order is that the terminal rate is bound to the intermediate rate so that neither the right to receive a reasonable intermediate rate nor to meet the competition at the terminal is preserved.

Were any proof of this needed, in additon to what is contained in our main brief, it is found in the fact that there are more than three thousand commodity rates to the coast adjusted so as to meet there the competition of water carriers. It is immediately apparent that no arbitrary percentage relation between terminal and intermediate rates can be so applied that all of these three thousand rates will meet the competition at the terminal and at the same time preserve reasonable rates in the interior. Proof of this is afforded by the Salt Lake case. Before that case was decided the carriers had about 160 commodity rates to Salt Lake. The Commission established there 208 commodity rates as reasonable rates. It also established class rates, reasonable in themselves, to apply to all other traffic. But if these percentages are adopted it will force the removal from the class rates of very many items of traffic and bring about the installation at Salt Lake of several hundred commodity rates in addition to those estab-

lished by the Commission, all of which will be less than the class rates, and therefore less than what the Commission itself has prescribed as reasonable rates.

In any aspect of the case these propositions are plain:

(1) The carrier is entitled to charge a just and reasonable rate to the intermediate point; when complaint is made that any rate is not just and reasonable at that point the Commission is empowered by the fifteenth section to say, and it is its duty to say, what, as a maximum, the rate should be; and though complaint was made by intermediate points, the Commission has not done so.

(2) The carrier, on the other hand, is entitled to make to the terminal point any rate lower than the intermediate rate, which competition encountered at the terminal point actually requires it to make in order fully to meet that competition, so long as the rate is not depressed to a point where the expenses incident to the movement of traffic under it would exceed the return which the rate yields. Whatever may be the meaning of the term "extent" the Commission, in disposing of these applications, was bound to accord the carriers this right, *without reference to intermediate rates;* and if the term "extent" has the broad meaning claimed, the Commission will fix the point below which the terminal rate should not be reduced.

(3) The lower rate thus made to the terminal cannot discriminate against the intermediate

point because it merely allows of the substitution of one form of carriage for another and permits the rail carrier to move under it, to the terminal, traffic, which, if the rail carrier were forbidden to make it, would merely be diverted to the water carrier and reach the terminal at the same or at a lower rate.

(4) The orders of the Commission, instead of allowing the terminal rate to move freely up and down, as conditions require, within these non-discriminatory limits, *ties the intermediate rate to it,* and makes the reduction of the latter an absolute condition of any reduction of the former. It thus requires the abandonment of terminal traffic or the acceptance of less than reasonable rates on intermediate traffic. This we conceive to be the essential vice of the Commission's orders, for it cannot be that a rate of $1 from St. Paul to Spokane, which is just and reasonable to-day, becomes unreasonable to-morrow for no other reason than that competition at Seattle shall to-morrow require the carrier to make a rate of 90 cents to that point.

Respectfully submitted,

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INTERMOUNTAIN RATE CASES.[1]

APPEALS FROM THE UNITED STATES COMMERCE COURT.

Nos. 136, 162. Argued October 18, 21, 22, 1912.—Decided June 22, 1914.

Prior to the amendment of June 18, 1910, § 4 of the Act to Regulate Commerce lodged in the carrier the right to exercise a primary judgment, subject to administrative control and ultimate judicial review, concerning the necessity and propriety of making a lower rate for the longer than the shorter haul, thus giving the carrier power to exert its judgment as to things of a public nature; but the amendment withdrew that right of primary judgment and lodged it in the Interstate Commerce Commission to be exercised on request and after due investigation and consideration of the public interests concerned and in view of the preference and discrimination clauses of §§ 2 and 3 of the act.

The long and short-haul provisions of § 4 of the Act to Regulate Commerce as amended by the act of June 18, 1910, are not repugnant to the Constitution of the United States as a delegation of power to the Interstate Commerce Commission beyond the competency of Congress.

If a statute is constitutional, this court must be governed by it and its plain meaning; with the wisdom of Congress in adopting the statute this court has nothing to do.

In *Louis. & Nash. R. R. Co.* v. *Kentucky*, 183 U. S. 503, this court decided that a general enforcement of the long and short-haul clause of the Act to Regulate Commerce would not be repugnant to the Constitution, and will not now reconsider and overrule that decision.

The Commerce Court had jurisdiction of a suit to enjoin the enforcement of the order of the Interstate Commerce Commission involved in these cases and which refused the request of carriers to put in force rates requested by them.

Under § 4 of the Act to Regulate Commerce, as amended by the act of June 18, 1910, the Interstate Commerce Commission has power to make an order, such as that involved in these cases, permitting a

[1] Docket title of these cases: No. 136, United States of America, Interstate Commerce Commission et al., *v.* Atchison, Topeka & Santa Fe Railway Company et al. No. 162, United States of America, Interstate Commerce Commission et al., *v.* Atchison, Topeka & Santa Fe Railway Company et al.

lower rate for the longer haul but only on terms stated in the order, establishing zones for the intermediate points and relative percentages upon which proportionate rates should be based.
191 Fed. Rep. 856, reversed.

THE facts, which involve the constitutionality of the long and short-haul provisions of the Act to Regulate Commerce as amended by the act of June 18, 1910, and the validity of an order made in pursuance thereof by the Interstate Commerce Commission, are stated in the opinion.

Mr. Attorney General Wickersham and *Mr. Assistant to the Attorney General Fowler*, with whom *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Charles Donnelly, *Mr. F. W. M. Cutcheon* and *Mr. F. C. Dillard* for appellees.

Mr. Rush C. Butler, *Mr. William E. Lamb*, *Mr. Stephen A. Foster* and *Mr. Cornelius Lynde* filed a reply brief on behalf of the Chicago Association of Commerce.

Mr. Joseph N. Teal for Portland Chamber of Commerce.

Mr. J. B. Campbell for the City of Spokane.

Mr. William A. Glasgow, Jr., for Giroux Consolidated Mines Co.

By leave of court, *Mr. Alfred P. Thom* filed a brief in behalf of certain interested parties.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

We shall seek to confine our statement to matters which are essential to the decision of the case. The provisions of § 4 of the Act to Regulate Commerce dealing with what is known as the long and short-haul clause, the power of

carriers because of dissimilarity of circumstances and conditions to deviate from the exactions of such clause and the authority of the Interstate Commerce Commission in relation to such subjects were materially amended by the act of June 18, 1910, c. 309, 36 Stat. 539, 547. Following the form prescribed by the Commission after the amendment in question, the seventeen carriers who are appellees on this record made to the Interstate Commerce Commission their "application for relief from provisions of fourth section of Amended Commerce Act in connection with the following tariffs." The tariffs annexed to the applications covered the whole territory from the Atlantic seaboard to the Pacific coast and the Gulf of Mexico, including all interior points and embracing practically the entire country, and the petition asked the Interstate Commerce Commission for authority to continue all rates shown on the tariffs from the Atlantic seaboard to the Pacific coast and from the Pacific coast to the Atlantic seaboard and to and from interior points lower than rates concurrently in effect from and to intermediate points. It was stated in the petition: "This application is based upon the desire of the interested carriers to continue the present method of making rates lower at the more distant points than at the intermediate points; such lower rates being necessary by reason of competition of various water carriers and of carriers partly by water and partly by rail operating from Pacific coast ports to Atlantic seaboard ports; competition of various water carriers operating to foreign countries from Pacific coast ports and competition of the products of foreign countries with the products of the Pacific coast; competition of the products of Pacific coast territory with the products of other sections of the country; competition of Canadian rail carriers not subject to the Interstate Commerce Act; competition of the products of Canada moving by Canadian carriers with the products of the United States; rates established via

the shorter or more direct routes, but applied also via the longer or more circuitous routes." After full hearing the Commission refused to grant unqualifiedly the prayer of the petition but entered an order permitting in some respects a charge of a lower rate for the longer haul to the Pacific coast than was asked for intermediate points provided a proportionate relation was maintained between the lower rate for the longer haul to the Pacific coast and the higher rate to the intermediate points the proportion to be upon the basis of percentages which were fixed. For the purposes of the order in question the Commission in substance adopted a division of the entire territory into separate zones which division had been resorted to by the carriers for the purposes of the establishment of the rates in relation to which the petition was filed. Refusing to comply with this order the carriers commenced proceedings in the Commerce Court praying a decree enjoining the enforcement of the fourth section as amended on the ground of its repugnancy to the Constitution of the United States and of the order as being in any event violative of the amended section as properly construed. An interlocutory injunction was ordered. The defendants moved to dismiss and on the overruling of the motions appealed from the interlocutory order, the case being No. 136. Subsequently upon the election of the defendants to plead no further a final decree was entered and appealed from, that appeal being No. 162.

It suffices at this moment to say that all the contentions which the assignments of error involve and every argument advanced to refute such contentions, including every argument urged to uphold on the one hand or to overthrow on the other the action of the Commission, as well as every reason relied upon to challenge the action of the court or to sustain its judgment, are all reducible to the following propositions:

(a) The absolute want of power of the court below to